Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

RONALD O. OTTE and BRUCE M. BOTELHO,

Petitioners,

v.

JOHN DOE I, JANE DOE, and JOHN DOE II,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Alaska's sex offender registration act, Alaska Stat. § 12.63.010 *et seq.*, requires convicted sex offenders to register with the Alaska Department of Public Safety and makes offender information available to the public. The department elected to publish the information on the Internet. Does the statute, on its face or as implemented by the Department of Public Safety, impose punishment for purposes of the *Ex Post Facto* Clause of the United States Constitution?

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OPINIONS BELOW

The amended opinion of the court of appeals (App. 1a) is reported at 259 F.3d 979. The initial opinion of the court of appeals (App. 33a) is reported at 248 F.3d 832. The orders of the district court (App. 69a, 118a) are unreported.

JURISDICTION

The court of appeals issued its initial decision on April 9, 2001. On July 24, 2001, and again on August 8, 2001, the court of appeals amended its decision. The court of appeals entered identical orders denying the state's petitions for rehearing *en banc* on August 23, 2001, and September 6, 2001. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Article I, Section 10 of the Constitution provides: "No State shall . . . pass any . . . ex post facto law. . . ."

The Alaska sex offender registration law, Alaska Stat. §§ 12.63.010-12.63.100 and § 18.65.087, and pertinent Alaska regulations are reproduced in the Appendix (App. 125a).

STATEMENT OF THE CASE

A. Statutory Background

As of 1993, Alaska's rate of child sexual abuse was the highest in the nation and six times the national average; its rate of sexual assault was the second highest in the nation and had nearly doubled in the previous two years. *See Hearing on HB 69 before House State Affairs Committee*, 18th Alaska Legis., 1st Session (Feb. 2, 1993). In response to this crisis, Alaska's legislature in 1994 enacted the Alaska Sex Offender Registration Act.

When adopting the statute, the legislature announced that its purpose was to "protect[ ] the public from sex offenders." 1994 Alaska Sess. Laws ch. 41, § 1. In keeping with this remedial objective, the legislature required registration of sex offenders who had committed their offenses before the law's effective date. The only sex offenders who were exempt from registration were those who had only one felony conviction and who had been unconditionally discharged before July 1, 1984. *See* 1994 Alaska Sess. Laws ch. 41, § 12(a).

The statute has two principal components. First, it requires persons convicted of sex offenses (such as child kidnapping, felony sexual assaults, sexual abuse of a minor, and distribution of child pornography) to register with the state. Alaska Stat. §§ 12.63.010 (registration requirements); 12.63.100(6) (sex offenses covered). Incarcerated sex offenders must register with the Department of Corrections; otherwise, sex offenders must initially register "in person" at the Alaska state trooper post or municipal police department. Alaska Stat. § 12.63.010(b).

Persons convicted of the most serious sex offenses must provide "written verification" of the registration information four times a year for life, while other sex offenders must do so once a year for 15 years. Alaska Stat. § 12.63.010(d).

Second, the statute provides that the registration information be made available to the public, thereby accomplishing its central objective. The legislation established a central registry for sex offender information, to be maintained by the Alaska Department of Public Safety. Alaska Stat. § 18.65.087(a). The department has exercised its authorized discretion by publishing the information on the Internet, thereby facilitating public access to it.

B. Proceedings Below

Among the sex offenders who fell within the scope of the new law were John Doe I and John Doe II. Doe I had sexually abused his daughter for two years while she was between the ages of nine and eleven. For this crime, Doe I had been sentenced to eight years' imprisonment. He was released from prison in 1990. App. 4a. John Doe II had sexually abused his daughter when she was 14 years old. He, too, had been sentenced to eight years' imprisonment and was released from prison in 1990. *Id.*

The Does filed a civil suit in federal district court, arguing, among many other things, that the sex offender registration statute violated the *Ex Post Facto* Clause as applied to persons whose offenses were committed before the statute's effective date. In 1999, the district court

granted summary judgment in favor of the state on all of the Does' claims. App. 69a, 118a.

The Ninth Circuit Court of Appeals reversed, holding that the statute violates the *Ex Post Facto* Clause as applied to offenders who were convicted before the statute's effective date. In addressing the pivotal question whether Alaska's statute is punitive or remedial, the panel acknowledged (in both its initial and amended opinions) that if the legislature intended the statute to be civil in nature, the party challenging the statute must provide "the clearest proof" that the statutory scheme is so punitive that it should nevertheless "be considered to constitute punishment." App. 8a, 40a (quoting *United States v. Ward*, 448 U.S. 242, 248 (1980)).

In its original opinion, the court of appeals concluded that it was unclear whether the Alaska legislature intended the statute to be civil or criminal in nature. The court therefore declined to require the Does to provide the "clearest proof" and instead applied "ordinary and customary legal standards" to determine whether the effect of the Alaska statute is punitive. App. 46a-47a. After reviewing the seven factors identified by this Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), the Ninth Circuit found that "the Act's effect is sufficiently punitive" to be "classified as punishment for *Ex Post Facto* Clause purposes." App. 64a.

In concluding that the Alaska statute is punitive, the court of appeals relied in part on the supposed requirement that some offenders visit the police station in person four times a year to verify their registration information. App. 39a, 48a, 55a-56a, 63a-64a. The state

filed a petition for rehearing *en banc* which pointed out that Alaska's statute does not, in fact, require any offender to visit the police station "in person" to verify his registration information; the statute requires only "written verification." (The court read the statute as it did based entirely on an answer given by the state's attorney to a question posed at oral argument. App. 7a n.4.) The petition also challenged the court's view that the legislature's "intent" was ambiguous. The state observed that the Washington sexual offender registration statute deemed "remedial" in *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997), *cert. denied sub nom., Stearns v. Gregoire*, 523 U.S. 1007 (1998), shared the very structural features that were cited by the *Doe* court as proof of the ambiguity of the Alaska legislature's intent.

On August 8, 2001, the court of appeals issued an amended opinion, which acknowledged that Alaska's statute was "remarkably similar" in structure to the Washington law. The court accordingly held that the intent of the Alaska law is non-punitive, and that only the "clearest proof" of punitive effect could negate that intent. App. 12a-13a. The court nonetheless reached the same result as when it had declined to apply the "clearest proof" standard. (Indeed, the portion of the opinion applying the seven *Mendoza-Martinez* factors is copied from the original opinion almost verbatim.)

The court agreed that several factors militated in favor of finding the statute non-punitive. Historically, "sex offender registration and notification provisions have not been regarded as punishment"; the statute does not contain a *mens rea* requirement; and the statute has the non-punitive purpose of protecting public safety.

App. 18a-19a, 23a, 29a-30a. The court found, however, that several other factors not only outweighed those three factors, but also provided the "clearest proof" of punitive effect.

The court stated that "[t]wo factors, particularly, demonstrate" the punitive effect of the statute: the substantial disability it imposes and its purported excessiveness. App. 28a-29a. Regarding the former, the court (again) pointed to the supposed requirement that some offenders visit the police station in person four times a year to verify their registration information. The court also was troubled by the state's decision to post registration information on the Internet, which "exposes all registrants to world-wide obloquy and ostracism." *Id.* The court found the statute excessive because it relies on the offender's convictions as a conclusive measure of the risk posed by the offender, rather than requiring individualized assessments of risk. Thus, information on all sex offenders is "available world-wide on the internet without any restriction." App. 24a.

The state again petitioned for rehearing *en banc*, arguing, among other things, that the panel had erred by persisting in relying on the misstatement of the state's attorney. The petition for rehearing was denied. App. 123a.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's Decision Erodes the States' Ability to Protect the Public From Sex Offenders

Every state in the nation has enacted a version of "Megan's Law," which requires convicted sex offenders

to register with the state and provides for the disclosure to the public of that information.[1]

The general objective of these laws is to limit recidivism by alerting the public to potential threats to public safety posed by convicted sex offenders. The universal adoption of sex offender registration laws reflects the important interests they serve and the states' belief in their efficacy.

These state registration and notification laws vary widely, both in what they require of offenders and in the means by which they make the registry's information available. In spite of the formal variation among state laws, the key features of Alaska's statute are neither unique to Alaska nor peripheral to the core objective of disseminating information about offenders.

Thus, Alaska is not alone in relying on prior convictions as the exclusive measure of the future risk posed by an offender. One recent survey of state laws identified 19 states that "require[] all offenders convicted of certain child or sex offenses specified by the legislature to register and undergo notification, without regard for risk of individual offender recidivism." Wayne A. Logan, *A Study in "Actuarial Justice": Sex Offender Classification Practice and Procedure*, 3 Buff. Crim. L. Rev. 593, 603

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[1] *See Doe v. Dep't of Public Safety ex rel. Lee*, Nos. 01-7600, 01-7561, 2001 WL 1336037 (2d Cir. Oct. 19, 2001) (citing *Roe v. Farwell*, 999 F. Supp. 174, 177 n.1 (D. Mass. 1998); Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. Crim. L. & Criminology 1167, 1172 (1999)).

(2000). Among these states are Illinois, Michigan, and Virginia.[2]

Nor is Alaska alone in using the Internet to facilitate public access to the registry. States that make sex offender information available on the Internet include Delaware, Georgia, Illinois, Kentucky, Michigan, Nebraska, North Carolina, South Carolina, Virginia, and West Virginia.[3]

And the number of states that make this information available on the Internet appears to be growing. *See* Note, *Megan's Law: Analysis on Whether It Is Constitutional to Notify the Public of Sex Offenders via the Internet*, J. Marshall J. Computer & Info. L. 1133, 1137 (1999) (identifying eight states that used the Internet for notification as of 1998).

By holding Alaska's version unconstitutional as applied to persons convicted prior to enactment, the Ninth Circuit has significantly restricted the means by which states in the Ninth Circuit, and possibly across the country, can enforce their laws.

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[2] Wayne A. Logan, *A Study in "Actuarial Justice": Sex Offender Classification Practice and Procedure*, 3 Buff. Crim. L. Rev. 593, 603 n.39 (2000); *see also, e.g.*, 730 Ill. Comp. Stat. § 150/2 *et seq.*; Mich. Comp. Laws § 28.722 *et seq.*; Va. Code § 19.2-298.1.

[3] These states' sex offender registry sites are, respectively: <http://www.state.de.us/dsp/sexoff/index. htm>; <http://www.ganet.org/gbi/disclaim.html>; <http://samnet.isp.state.il.us/ispso2/sex_offenders/index.asp>; <http://kspsor.state.ky.us>; <http://www.mipsor.state.mi.us>; <http://www.nsp.state.ne.us/sor>; <http://sbi.jus.state.nc.us/sor>; <http://www.scattorneygeneral.com/public/registry.html>; <http://sex-offender.vsp.state.va.us>; <http://www.wvstatepolice.com/sexoff>.

II. The Decision Below Conflicts with a Decision of the Tenth Circuit

The Ninth Circuit's decision directly conflicts with the decision of the Tenth Circuit in *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000). In *Femedeer*, the Tenth Circuit considered a Utah sex offender registration statute that shares the two features principally relied upon by the Ninth Circuit as evidence that Alaska's statute is punitive. Like Alaska's statute, Utah's statute requires everyone convicted of a sex offense to register; it contains no mechanism for individualized assessment of risk. Utah Code § 77-27-21.5. And, like Alaska, Utah makes information from the sex offender registry available to the public on the Internet. *Femedeer*, 227 F.3d at 1247. As the court explained, in Utah, "[a]ccess to this information is not controlled in any way; anyone with access to the Internet can access all of the registry information, regardless of their place of residence or any other specific need." *Id.* But the Tenth Circuit held that neither of these features made the Utah statute punitive.

With respect to the first feature – the statute's lack of any mechanism for individualized risk assessment – the Tenth Circuit acknowledged that "[o]ther states have chosen to incorporate more defined risk assessment mechanisms into their sex offender registry and notification schemes." *Femedeer*, 227 F.3d at 1253. But the court said this feature of the Utah statute did not make the statute excessive in relation to its legitimate purpose. Rather, a statute's failure to "achieve[] a perfect fit between ends and means" does not necessarily make the statute punitive. *Id.*

With respect to the second feature – the state's use of the Internet to make sex offender information available to the public – the Tenth Circuit observed that "[d]issemination of information about criminal activity . . . has never been regarded as punishment when it is done in furtherance of a legitimate governmental interest." *Femedeer*, 227 F.3d at 1251. The use of the Internet, ruled the court, "works merely a technological extension, not a sea change, in our nation's long history of making information public regarding criminal offenses." *Id.* The court also rejected the notion that Internet publication imposes "excessive costs" on the offenders: "the farther removed one is from a sex offender's community and from Utah generally, the less likely one will be to have an interest in accessing this particular registry." *Id.* at 1253. In sum, the benefits of Internet notification "justif[y] the means employed." *Id.*

All told, the Tenth Circuit concluded that the evidence that Utah's statute was punitive "does not come even close to the 'clearest proof' necessary to overcome the civil intent of Utah's legislature." *Femedeer*, 227 F.3d at 1253. Not surprisingly, then, the Ninth Circuit explicitly acknowledged its differences with the Tenth Circuit. After pointing out a minor difference between Utah's notification mechanism and Alaska's notification mechanism, the Ninth Circuit said: "In any event, we respectfully disagree with the conclusions espoused by the Tenth Circuit in *Femedeer*." App. 25a n.11.[4]

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[4] The Alaska and Utah statutes differ in that Utah's statute requires registration by those "found not guilty by reason of insanity" of sex offenses, while Alaska's does not. *Compare* Utah

Of course, the Ninth Circuit also relied on a third factor in declaring Alaska's law punitive: the supposed requirement that some sex offenders re-register "in person" at the police station four times a year. As noted above, however, Alaska's statute does not in fact require "in person" re-registration. Under the Alaska statute, the offender must register "in person" just once, when he is released from prison or enters the state. *See* Alaska Stat. § 12.63.010(b) (requiring registration "in person" at the nearest police station). After this initial registration, the offender is required only to provide quarterly or annual "written verification" of his registration information. Alaska Stat. § 12.63.010(d). *See also* 13 Alaska Admin. Code §§ 09.025, 09.030 (offender may be required to visit police station every five years to be re-photographed).[5]

Stat. § 77-27-21.5(1)(d)(iii) *with* Alaska Stat. § 12.63.100(3). The Ninth Circuit discussed this feature of the Alaska statute briefly, stating "this factor also provides support for the conclusion that the Act's effect is punitive." App. 23a. Even a cursory reading of the Ninth Circuit's opinion makes clear that this one difference between the statutes was not responsible for the different outcomes. And as the Ninth Circuit acknowledged, in Alaska, the defense of insanity is available only to the very rare offender who is unable to appreciate the basic "nature and quality" of his conduct, *e.g.*, is unable to appreciate that he engaged in sexual relations. *Id.* at 22a n.9. It is difficult to see how the Alaska statute's failure to cover sex offenders fitting within that small category makes the statute more punitive.

[5] The Ninth Circuit's decision in *Doe v. Otte*, 259 F.3d 979 (9th Cir. 2001), also conflicts with the decision by Alaska's intermediate appellate court in *Patterson v. State*, 985 P.2d 1007 (Alaska Ct. App. 1999). In *Patterson*, the court concluded that Alaska's statute did not violate the *Ex Post Facto* Clause. *Id.* at 1011-13. The Alaska Supreme Court is presently considering the *ex post facto* issue in a quartet of cases: *State v. Doe*, No. S-8972;

III. The Ninth Circuit Erred By Far Too Readily Disregarding the Legislature's Remedial Intent

The Ninth Circuit simply was wrong in concluding that Alaska's statute was dramatically different from, and dramatically more "punitive" than, sex offender registration statutes upheld in cases like *Russell*, 124 F.3d at 1087; *Doe v. Pataki*, 120 F.3d 1263, 1284 (2d Cir. 1997), *cert. denied*, 522 U.S. 1122 (1998); and *E.B. v. Verniero*, 119 F.3d 1077, 1098 (3d Cir. 1997), *cert. denied sub nom., Verniero v. W.P.*, 522 U.S. 1110 (1998). The factors relied upon by the Ninth Circuit for finding the Alaska statute punitive fall far short of overcoming the strong contrary presumption created by the legislature's intent to enact a remedial civil scheme.

Elmore v. State, No. S-9495; *Martin v. State*, No. S-10139; and *Doe v. State*, No. S-10338. This Court should not wait for the Alaska Supreme Court to decide these cases. First, giving the Alaska Supreme Court time to decide its cases will not materially aid this Court in resolving the issues presented in this petition. Though this Court would be bound by a state supreme court's construction of a state statute, the Court will not be bound by a state supreme court's conclusion as to whether the statute complies with federal constitutional law. *See O'Brien v. Skinner*, 414 U.S. 524, 531 (1974). Whether the statute requires quarterly in-person verification is not even an issue in the state cases. The Alaska statute is so clear and the Ninth Circuit's reading of the statute is so obviously at odds with the text that this Court should grant the petition at this time and then decide the constitutional issue. Second, the decisions by the Alaska Supreme Court, regardless of their outcomes, will not resolve the conflict between the Ninth and Tenth Circuits.

First, the Alaska legislature's decision to rely on past convictions as evidence of future dangerousness does not make Alaska's statute punitive. A wide array of remedial, civil statutes impose consequences on offenders exclusively on the basis of a past conviction, without any individualized risk assessment. Two obvious examples are statutes prohibiting the possession of firearms by convicted felons, *see, e.g.*, Alaska Stat. § 11.61.200, and statutes debarring convicted felons from the practice of medicine. *See Hawker v. New York*, 170 U.S. 189 (1898) (holding that use of felony conviction as conclusive evidence of unfitness to practice medicine not punitive).

Second, Alaska's use of the Internet to provide public access to information contained in the sex offender registry does not make Alaska's law punitive. The availability of sex offender information "world-wide" does not, as the Ninth Circuit ruled, make the statute "excessive in relation to the alternative purposes assigned." App. 23a-24a, 27a. Alaska makes the information available worldwide only because the best vehicle for providing *local* access – the worldwide web – necessarily facilitated wider access as well. An Internet provider does not have the option of providing content only to users whose computers are located within a particular geographical area. *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 853-54 (1997). Not surprisingly, state and local governments routinely make information of purely local interest available "world-wide" on the Internet.

Further, there is no reason to suppose that the availability of sex offender information "world-wide" will have a significant impact on any sex offender. It is difficult to understand why anyone in, say, Florida or Brazil

would have an interest in the Alaska sex offender registry.

The court of appeals also was wrong to express concern about the ease with which local residents could access information through the Internet. *See* App. 14a, 16a, 24a. The very point of sex offender registration is to provide local residents with information necessary to enable them to protect themselves and their children from offenders. It does not make sense both to acknowledge the importance of this purpose and at the same time to argue that the efficient accomplishment of the purpose makes the sex offender registration act punitive.

In one very important sense, Internet notification is far less intrusive than vehicles chosen by some other states for facilitating public access to sex offender material. Though the state's use of the Internet makes the sex offender information readily available to those who pursue it, it makes the information available to no one else. As this Court explained in *Reno v. American Civil Liberties Union*, 521 U.S. at 854, "the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial." Of pornography, the Court said, "[t]hough such material is widely available, users seldom encounter such content accidentally." *Id.* The same is true of sex offender information. This makes Internet publication less intrusive than, say, mailing an information packet concerning the sex offender to everyone who lives within a certain distance of him. *See, e.g., E.B. v. Verniero*, 119 F.3d at 1088.

Finally, the Ninth Circuit's adoption of a verifiably false interpretation of Alaska's law, in reliance on a mistatement at oral argument, was manifestly in error. This Court long has recognized that questions of law should not be resolved on the basis of a stipulation of the parties. *See, e.g., Young v. United States*, 315 U.S. 257, 259 (1942); *Estate of Sanford v. Comm'r of Internal Revenue*, 308 U.S. 39, 50-51 (1939); *Swift & Co. v. Hocking Valley Ry. Co.*, 243 U.S. 281 (1917). Two factors make the court's reliance on the state's "concession" particularly inapt in this case. First, the state's "concession" obviously was not a product of deliberation; the "concession" was made at oral argument, in response to a judge's question concerning an aspect of the law that had not been addressed in the parties' briefs. Second, the state's error was brought to the court's attention *before* the court undertook the critical task of determining whether the statute's "effects" provided "the clearest proof" of a punitive end.

The requirement that some offenders provide quarterly *written* verification of their whereabouts is not so onerous as to make the act punitive. Quarterly reporting requirements are relatively common; perhaps the most well-known is the requirement that persons who are self-employed pay "estimated taxes" every three months. *See* 26 U.S.C. § 6654(c). Indeed, this Court has upheld quarterly reporting requirements even when the requirements affect the exercise of constitutional rights. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 900-01 (1992) (upholding statute that required abortion facilities to "file quarterly reports showing the number of abortions performed broken down by trimester"); *Buckley v. Valeo*, 424

U.S. 1, 62-64 (1976) (upholding statute that required candidates for public office to file quarterly reports identifying the sources of campaign contributions).

All told, the Ninth Circuit committed manifest error when it held that Alaska's sex offender registration statute violates the *Ex Post Facto* Clause. Given the importance of the issue and the conflict among the circuits that the Ninth Circuit's decision creates, review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CYNTHIA M. COOPER
Deputy Attorney General

November 21, 2001

No. _____

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UNITED STATES COURT OF APPEALS,
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No. 99-35845

JOHN DOE I, JANE DOE, AND JOHN DOE II,
PLAINTIFFS-APPELLANTS

v.

RONALD O. OTTE AND BRUCE M. BOTELHO,
DEFENDANTS-APPELLEES

[Argued and Submitted: August 1, 2000 –
Anchorage, Alaska
Opinion Filed: April 9, 2001
Amended July 24, 2001
Amended August 8, 2001]

Before: D.W. NELSON, REINHARDT and THOMAS, Circuit Judges

Opinion by Judge REINHARDT

REINHARDT, Circuit Judge:

This case involves an extremely sensitive and difficult question, both from a social and legal standpoint. How may society deal with convicted sex offenders *after* they have been punished for their crimes? How can society protect itself against future offenses and at the same time safeguard the constitutional rights of persons who have fully paid the price imposed by law for their crimes? The issues treated in the Alaska Sex Offender Registration Act we consider here differ only in degree from a host of other issues the citizens of this country regularly

face in trying to resolve the inherent tensions between safety and freedom that exist in any democracy.

As it turns out, we can decide the case before us without having to resolve the most fundamental question posed by the Alaska statute: that is, in light of the fundamental liberty interest protected by the Due Process Clause, may rehabilitation, or a judicial determination of lack of future risk, be wholly ignored when imposing restrictive requirements and obligations on persons who have committed a sexual offense and been fully punished for their crimes? Instead, we base our decision on a far narrower constitutional provision, the Ex Post Facto Clause.

The plaintiffs in this action are convicted sex offenders who have completed their sentences. They claim that Alaska's sex offender registration and notification statute, enacted after their convictions, both constitutes an ex post facto law and violates their due process rights. U.S. Const. Article I, § 10; Amend. 14. Because we conclude that, as to defendants whose crimes were committed before its enactment, the Alaska statute violates the Ex Post Facto Clause, we do not resolve the question whether it also violates the Due Process Clause.

The Ex Post Facto Clause serves two purposes: it requires fair notice, and, particularly relevant to the Alaska statute, it acts to "restrai[n] arbitrary and potentially vindictive legislation." *Weaver v. Graham*, 450 U.S. 24, 29, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138, 3 L.Ed. 162 (1810) (the Ex Post Facto Clause checks "the violent acts which might grow out of the feelings of the moment"). Convicted sex

offenders have good reason to fear vindictive legislation. Their crimes are viewed by society as an affront to the institution of the family. More important, many of us fear that upon their release, sex offenders will prey on our children and those of our neighbors.

The Ex Post Facto Clause expresses our commitment to constrain the manner in which legislatures can address intense fears of the type evoked by the return to the community of convicted sex offenders. However, its check on legislative power is quite limited – it merely requires that punishment be prospectively imposed. Because the Alaska Sex Offender Registration Act does not comply with this minimal protection, we hold that it may not be applied to persons whose crimes were committed before its enactment.

I. BACKGROUND

A. *Factual background*

On May 12, 1994, Alaska enacted the Alaska Sex Offender Registration Act (sometimes referred to in this opinion as "the Act" or "the Alaska statute"), which requires convicted sex offenders to register with law enforcement authorities and authorizes public disclosure of information in the sex offender registry. 1994 Alaska Sess. Laws 41. In its implementing regulations, Alaska provides that it will, in all cases, post the information from the registry for public viewing in print or electronic form, so that it can be used by "any person" "for any purpose." Alaska Admin. Code tit. 13, § 09.050(a) (2000). Upon passage of the Act, two men required to register, John Doe I and John Doe II, as well as John Doe I's wife,

immediately brought a 42 U.S.C. § 1983 action against the state commissioner for public safety and state attorney general to enjoin its enforcement.

In 1985, nine years before the Alaska statute was enacted, Doe I had entered a plea of nolo contendere to a charge of sexual abuse of a minor after a court determined that he had sexually abused his daughter for two years while she was between the ages of nine and eleven. He was sentenced to twelve years incarceration, of which four years were suspended; he was released from prison in 1990. After being released, Doe I was granted custody of his daughter, based on a court's determination that he had been successfully rehabilitated. In making its determination, the court relied, in part, on the findings of psychiatric evaluations concluding that Doe I has "a very low risk of re-offending" and is "not a pedophile." Also, since his release, Doe I married Jane Doe, who was aware of Doe I's conviction for a sex offense.

Jane Doe is a registered nurse in Anchorage, and is well known in the medical community there. She alleges that disclosure of her husband's criminal background will "undermine [her] professional relationships," and her ability to obtain and care for patients.

The third plaintiff, John Doe II, entered a plea of nolo contendere on April 8, 1984 to one count of sexual abuse of a minor for sexual abuse of a 14-year-old child. He was sentenced to eight years in prison, released in 1990, and subsequently completed a two-year program for the treatment of sex offenders.

B. *Prior Proceedings*

The plaintiffs filed a complaint in the district court claiming that the Alaska statute violates their federal and state constitutional rights and sought leave to proceed under pseudonyms. The district judge granted a preliminary injunction requiring the plaintiffs to register under the act but prohibiting public disclosure of the registration information; at the same time he denied their request to proceed under pseudonyms. *See Rowe v. Burton*, 884 F. Supp. 1372, 1388 (D. Alaska 1994).[1] The plaintiffs appealed the denial of their use of pseudonyms, and we dismissed the appeal because no final judgment had been entered. On remand, the district judge dismissed the complaint when the plaintiffs would not amend it to include their real names. The plaintiffs appealed the dismissal, and this court reversed, holding that the plaintiffs could proceed under pseudonyms.

With the nomenclature issue resolved, the parties in 1998 filed cross-motions for summary judgment. A different district judge granted the state's motion, and this appeal followed.[2]

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[1] When the complaint was filed, Doe I used the pseudonym "James Rowe." However, the court subsequently changed his pseudonym to "John Doe I" after an individual named James Rowe complained that he was suffering ill effects from Doe's use of the name in this matter.

[2] We offer no comment on the tortured course of the proceedings in this case or the fact that it is now seven years since the Alaska statute was enacted. We observe only that we now add to this judicial odyssey by deciding the case on the narrower of the two constitutional grounds, as that affords appellants all the relief they seek. The question whether the

C. *The Alaska Sex Offender Registration Act*

The Alaska Sex Offender Registration Act was enacted at a time when the state legislature perceived that Alaska's high rate of child sexual abuse constituted a "crisis." Legislators heard testimony that Alaska's rate of child sexual abuse was the highest in the country, that one-fourth of Alaska's prison inmates were incarcerated for sexual offenses, and that in 1993, one hundred sex offenders were scheduled for release from prison. On May 12, 1994, Alaska enacted its sex offender registration statute, and subsequently amended it in 1998 and 1999. 1998 Alaska Sess. Laws 81 & 106 (adding crimes to the list of "sex offenses" requiring registration); 1999 Alaska Sess. Laws 54 (defining "conviction").

The Alaska statute has two main components: it requires sex offender registration, with criminal penalties for failure to register, and it authorizes full disclosure of information about all offenders to the public. The registration provisions require persons convicted of a broad range of offenses against children and adults to register in person with local police authorities. Such offenses include, for example, sexual assault and possession of child pornography.[3] Alaska Stat. § 12.63.100(1)(B).

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statute offends the rights of persons whose crimes were committed after its enactment will have to wait for another day.

[3] Other offenses include child kidnaping, felony sexual assaults, sexual abuse of a minor, incest, unlawful exploitation of a minor, promoting or forcing a minor to engage in prostitution, distribution of child pornography, felony indecent exposure, and misdemeanor indecent exposure where the victim is under 16 and the defendant has a prior conviction for certain offenses. Alaska Stat. § 12.63.100.

Registrants must be photographed, provide fingerprints, and provide the following information: name, date of birth, address, place of employment, and information about the conviction (specifically the crime, date of conviction and place of conviction). Alaska Stat. § 12.63.010. Those convicted of "aggravated" sex offenses must register in person at their local police stations four times each year for life; those convicted of other sex offenses must register in person annually for fifteen years. Alaska Stat. § 12.63.020.[4]

Information collected under the Alaska Sex Offender Registration Act is forwarded to the Alaska Department of Public Safety, which maintains a central registry. Alaska Stat. § 18.65.087. The parties agree that the Department of Public Safety has published the collected information on its internet website, making it readily available to all persons world-wide. The information on the website, which can be searched by name, partial address, zip code or city, includes the offender's name, color photograph, physical description, street address, employer address and conviction information, all under the banner "Registered Sex Offender."

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[4] The Alaska statute, on its face, does not clearly specify that these registrations must be made in person at local police stations. However, the government represented at oral argument that periodic in-person registration at local police stations is required by the Act. When specifically asked whether registrants must "go to the police station" for their annual or quarterly registrations, the government answered "under the current law, yes."

II. EX POST FACTO CLAIM

The Ex Post Facto Clause prohibits states from enacting any law that "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391, 1 L.Ed. 648 (1798). There is no question that the Alaska statute, by its terms, applies to the plaintiffs even though their crimes were committed before its enactment. However, the question when considering whether a retroactively applicable statute is subject to the constraints of the Ex Post Facto Clause is not whether it "produces some ambiguous sort of 'disadvantage,' . . . but . . . whether [it] . . . increases the penalty by which a crime is punishable." *California Dep't of Corr. v. Morales*, 514 U.S. 499, 506 n. 3, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995). The key issue in this case is whether or not the Act is punitive, because only punitive statutes implicate the Ex Post Facto Clause.

Whether a statute should be classified as imposing punishment involves a two-step inquiry. We must first consider whether, when enacting the Act, the Alaska legislature "indicated either expressly or impliedly a preference for one label or the other." *United States v. Ward*, 448 U.S. 242, 248, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980). If we conclude that the legislature's intent was punitive, our inquiry is at an end. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963). If we conclude that the legislature did not intend the statute to be considered punitive, or that its intent is ambiguous, then we must inquire whether the statute is "so punitive either in purpose or effect" that it should be considered to constitute punishment. *Ward*, 448 U.S. at 249, 100 S.Ct. 2636. This two-step inquiry is known as the

"intent-effects test."[5] *Russell v. Gregoire*, 124 F.3d 1079, 1086 (9th Cir. 1997).

In other Ex Post Facto challenges to state sex offender registration and notification laws, some courts of appeals have analyzed separately the registration and notification provisions while others have looked to the statute as a whole. *Compare Russell*, 124 F.3d at 1087, 1089 (separately considering the registration and notification provisions); *Doe v. Pataki*, 120 F.3d 1263, 1276 (2d Cir. 1997) (same) *with Cutshall v. Sundquist*, 193 F.3d 466, 473-76 (6th Cir. 1999) (considering registration and notification provisions together). The Alaska legislature enacted the Alaska statute as a single piece of legislation, and the notification and registration provisions operate in tandem. Neither the structure of the statute nor the excerpts of the legislative debate included in the record indicate that the provisions were viewed as serving separate purposes. Nor does the state suggest on this appeal that the provisions should be treated separately for purposes of our constitutional analysis. Moreover, an Alaska intermediate appellate court recently considered the statute as a whole when deciding an Ex Post Facto challenge. *See Patterson v. Alaska*, 985 P.2d 1007, 1011-13 (Alaska Ct. App.1999).

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[5] The test is somewhat confusing, because the "effects" prong includes an exploration into both the effects of the statute and its actual purpose. The legislature's purpose is, of course, necessarily considered in the examination conducted under the first prong (the intent prong) of the test.

After reviewing the structure of the statute and its legislative history, we agree with the Alaska court that the proper approach is to analyze the statute as a whole.[6]

A. *Intent of the Alaska Sex Offender Registration Act*

To determine the legislature's intent when enacting the Alaska Sex Offender Registration Act, we consider the body's declared purpose, the structure of the statute, and its design. *Russell*, 124 F.3d at 1087. Section 1 of the Alaska statute states:

"The legislature finds that

(1) sex offenders pose a high risk of reoffending after release from custody;

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[6] *Patterson* concluded that neither the intent nor the effects of the Alaska statute were punitive. *Patterson*, 985 P.2d at 1013. Determining "whether a particular [statute] is civil or criminal is a matter of statutory construction." *Ward*, 448 U.S. at 248, 100 S.Ct. 2636. While we regard as "authoritative" the construction of a statute rendered by the state's highest court, *Russell*, 124 F.3d at 1090, we are *not* obligated to adopt that court's legal conclusion with regard to whether a legislature's purpose in enacting a statute is to punish. *Kansas v. Hendricks*, 521 U.S. 346, 365, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). In other words, we defer to a state highest court's determination concerning what the statute means, but we determine independently whether that meaning renders a statute punitive or not. Of course, we are not obligated to accept the *Patterson* court's construction of the Alaska statute because *Patterson* is not a decision of the Alaska Supreme Court. While we find some of its analysis persuasive, we ultimately reach the opposite conclusion as to whether, for Ex Post Facto purposes, the statute should be considered punitive.

(2) protecting the public from sex offenders is a primary governmental interest;

(3) the privacy interests of persons convicted of sex offenses are less important than the government's interest in public safety; and

(4) release of certain information about sex offenders to public agencies and the general public will assist in protecting public safety."

1994 Alaska Sess. Laws 41, § 1.

The court in *Patterson* held that these findings demonstrate that the legislature viewed the Act as a measure designed to accomplish a non-punitive purpose, protecting the public through the collection and release of information, and we agree. *Patterson*, 985 P.2d at 1011 (findings make clear that legislature viewed "recidivism of sex offenders [as] a problem," and sought to address the problem through "the release of certain information"). Furthermore, the circumstances in which the legislation was enacted – it was passed amid popular fear about the *release* of large numbers of sex offenders into the community as a means for members of the community to protect themselves – supports the conclusion that the legislature did not intend the Act to be punitive. In light of the legislative findings and history, we conclude that the legislature acted with a non-punitive intent.

The structure of the Act does not cause us to conclude otherwise, because it is remarkably similar to the Washington sex offender registration and notification statute that we found to be non-punitive in *Russell* (although the substance of these statutes is significantly different). Although the registration provision in the

Alaska statute is codified in the state's criminal code, rather than in its civil code, *see* Alaska Stat. § 12.63.010 (part of Title 12 of the Alaska Code, labeled "Criminal Procedure"), such is also the case with respect to the Washington statute. *See* Wash. Rev. Code § 9A.44.130 (part of Title 9A of the Washington Revised Code, labeled "Washington Criminal Code").

In light of *Russell* and the Alaska Act's legislative findings, we conclude that the legislative intent of the Act is non-punitive. Thus, we now turn to the "effects" prong to determine whether, notwithstanding the legislative intent, the statute should be treated as punitive for Ex Post Facto Clause purposes.

B. *The Alaska Statute's Punitive Effect*

When considering a statute's effect, we rely on an analysis of seven factors set forth by the Supreme Court in *Mendoza-Martinez*. *Russell*, 124 F.3d at 1087. They are:

1) whether the sanction involves an affirmative disability or restraint;

2) whether it has historically been regarded as a punishment;

3) whether it comes into play only on a finding of scienter;

4) whether its operation will promote the traditional aims of punishment – retribution and deterrence;

5) whether the behavior to which it applies is already a crime;

6) whether an alternative purpose to which it may rationally be connected is assignable to it; and

7) whether it appears excessive in relation to the alternative purpose assigned.

Mendoza-Martinez, 372 U.S. at 168-69, 83 S.Ct. 554.

We may "reject the legislature's manifest intent" and treat a statute as punitive "only where a party challenging the statute provides the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the State's intention." *Hendricks*, 521 U.S. at 361, 117 S.Ct. 2072 (internal quotations omitted); *Russell*, 124 F.3d at 1087. We applied these factors in *Russell* in order to determine whether Washington's narrowly drawn and strictly limited sex offender registration statute violated the Ex Post Facto Clause, and we held that it did not. *Russell*, 124 F.3d at 1089, 1093. Here, the application of the seven factors leads us to the conclusion that Alaska's statute, which is far broader and imposes far greater burdens on sex offenders than Washington's, is so punitive in its effect as to offend the Ex Post Facto Clause.

1. *Affirmative disability or restraint*

The Alaska Sex Offender Registration Act imposes an affirmative disability on the plaintiffs. First, its registration provisions impose a significant affirmative disability by subjecting offenders to onerous conditions that in some respects are similar to probation or supervised release. Like Washington's sex offender registration statute, Alaska's requires offenders being released from confinement to register. Alaska Code § 12.63.010(a); *Russell*,

124 F.3d at 1082. However, unlike the Washington statute, Alaska's requires sex offenders such as the plaintiffs to re-register at police stations four times each year every year of their lives. Alaska Code § 12.63.010(d). Moreover, in order to do so, they must appear in person at a police station on each occasion, and provide, under oath, a wide variety of personal information, including address, anticipated change of address, employer address, vehicle description, and information concerning mental health treatment for any "mental abnormality or personality disorder." § 12.63.010(b).

In *Russell*, we concluded that Washington's registration provisions did not impose an affirmative disability or restraint. *Russell*, 124 F.3d at 1088-89. However, as the state acknowledges, Alaska's registration requirement is vastly more burdensome than the one-time registration requirement at issue in *Russell*. We held in *Russell* that Washington's "simple registration" provision, involving a one-time only registration (except when changing one's address), does not work an affirmative disability or restraint. *Russell*, 124 F.3d at 1082, 1088. In part because Alaska's registration provision is far more onerous, we reach a different conclusion here.

Not only do the Alaska statute's registration provisions impose an affirmative disability, but its notification provisions do so as well. By posting the appellants' names, addresses, and employer addresses on the internet, the Act subjects them to community obloquy and scorn that damage them personally and professionally. For example, the record contains evidence that one sex offender subject to the Alaska statute suffered community hostility and damage to his business after printouts from

the Alaska sex offender registration internet website were publicly distributed and posted on bulletin boards.

In reviewing a sex offender law that authorized public inspection of sex offender records at police departments and permitted newspapers or others to disseminate the information, the Kansas Supreme Court concluded that the law imposed a disability because "[t]he practical effect of such unrestricted dissemination could make it impossible for the offender to find housing or employment." *Kansas v. Myers*, 260 Kan. 669, 923 P.2d 1024, 1041 (1996). Where the impact is substantially less severe, however, the disability is not such as to warrant a finding that the statute is punitive. Such was the conclusion in *Cutshall*, 193 F.3d at 471, where a Tennessee statute limited disclosure of information to the amount "deemed necessary . . . to protect the public concerning a specific sexual offender," and in *Pataki*, 120 F.3d at 1269-70, where a New York act permitted such disclosure only on the basis of an individualized assessment of the risk of recidivism. Alaska's system of posting all sex offenders' information on the internet is far closer to the statutory scheme in *Myers* and, in fact, is likely to have a far greater impact on offenders. Because the internet is much more accessible to the public than records at police departments, the obloquy and scorn noted in *Myers* are more certain to result.

A statute also may be considered non-punitive where the specific disability is narrow. In *Hudson v. United States*, 522 U.S. 93, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997), the Supreme Court held that a sanction of occupational debarment" from the banking industry for those found to have misappropriated bank funds is not an "affirmative

disability or restraint" because the disability is severely limited. *Hudson*, 522 U.S. at 104, 118 S.Ct. 488. In contrast, in the present case, the procedures employed under the Alaska statute are likely to make the plaintiffs *completely* unemployable. Alaska publishes the names and addresses of the registrants' places of employment on its sex offender internet site, and makes it simple for users of the site to search for the presence of any sex offenders working at a particular place of employment. By doing so, it creates a substantial probability that registrants will not be able to find work, because employers will not want to risk loss of business when the public learns that they have hired sex offenders. This disability is far more substantial than the one at issue in *Hudson*, which merely involved debarment from a single profession. Indeed, the breadth of the impact of the Alaska statute provides strong evidence that the statute's effect is punitive. *See Myers*, 923 P.2d at 1041 (sex offender statute that permits public disclosure of offender's employment information imposes an affirmative disability).

The state argues that *Russell* compels the conclusion that the Alaska statute's notification provisions do not impose an affirmative disability. As noted earlier, however, *Russell* involved a statute with a far more limited notification provision. The Washington statute we considered in *Russell* authorizes release of information only when it has been determined that the specific offender poses a risk of reoffending, and even then, the information disclosed is much more limited than the information Alaska discloses. *Russell*, 124 F.3d at 1082. Furthermore, under the Washington act, disclosure is limited to a narrow geographic area within the state of Washington,

whereas here the notification of a defendant's lurid past is world-wide. *Id.* Moreover, when considering whether Washington's limited notification provisions posed an affirmative disability, we "actively weigh[ed]" the harsh results of the community notification provisions, including "humiliation, ostracism, public opprobrium, and the loss of job opportunities," but decided that the disability was not "so egregious" as to prevent the court from concluding that the statute was regulatory. *Russell*, 124 F.3d at 1092.

In *Russell*, therefore, we *did* determine that the notification provisions imposed an affirmative disability. We made this clear by "actively weighing" the statute's consequences along with the other *Mendoza-Martinez* factors. We ultimately concluded, however, that the disability was insufficient to overcome the clear legislative intent that the statute not be punitive.

Considered as a whole, the Alaska statute's registration and notification provisions impose substantial disabilities on the plaintiffs. Both the registration and notification provisions are far more burdensome than the provisions we considered in *Russell*. When the applicable provisions of the Alaska statute are considered together, the first *Mendoza-Martinez* factor clearly favors treating the Act as punitive.

2. *Historical treatment*

Sex offender registration and notification statutes are of fairly recent origin.[7] Other courts considering such statutes consider whether they are analogous to historical shaming punishments. In *Russell*, we concluded that the provisions of the Washington statute were not. *Russell*, 124 F.3d at 1092. We reach the same conclusion here. Accordingly, the second factor favors treating the statute as non-punitive.

3. *Finding of scienter*

The third *Mendoza-Martinez* factor is whether the statute's provisions come into effect only upon a finding of scienter. *Mendoza-Martinez*, 372 U.S. at 168, 83 S.Ct. 554. A defendant must be convicted of a sex offense before the Alaska statute's provisions become applicable, and those offenses generally require a finding of scienter. However, some of the offenses that subject an offender to the Act's requirements are "strict liability" offenses that can be committed whether or not the defendant is aware of certain facts that make his conduct criminal. For example, conviction for sexual abuse of a minor under 13 years of age does not require any showing that the defendant knows that his victim is under that age. Alaska Stat. §§ 11.41.434; 11.41.445(b).

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[7] The first sex offender community notification statute was enacted by Washington in 1990. Alan R. Kabat, Note, *Scarlet Letter Sex Offender Databases and Community Notification: Sacrificing Personal Privacy for a Symbol's Sake*, 35 Am. Crim. L. Rev. 333, 334-35 (1998). After the 1994 killing of Megan Kanka in New Jersey, such statutes became widespread. *Id.*

Our inquiry when considering this factor is whether the Act's requirements may be imposed *only* upon a finding of scienter. *Hudson*, 522 U.S. at 104, 118 S.Ct. 488. While the Alaska statute generally requires a finding of scienter, its provisions do not become applicable *only* in such circumstance. Accordingly, like the second *Mendoza-Martinez* factor, this factor supports the conclusion that the Act is not punitive.

4. *Traditional aims of punishment*

When a statute promotes the traditional aims of punishment – retribution and deterrence, its effect is more likely to be considered punitive. *Id.* This court has previously held that Washington's statute, which is substantially less onerous than Alaska's, "may implicate deterrence," *Russell*, 124 F.3d at 1091, and the *Patterson* court reached the same conclusion with regard to the Alaska statute. *Patterson*, 985 P.2d at 1012. Accordingly, we conclude that the Act may provide a measure of deterrence; the threat of being subjected to mandatory registration and, particularly, publicly branded a sex offender, may presumably deter some persons who might otherwise become offenders.

While the Alaska statute may have some deterrent effect, it even more directly serves the other traditional aim of punishment – retribution. It is primarily this objective that causes us to weigh the fourth factor on the side of finding the Act punitive. The Act's onerous registration obligations appear to be inherently retributive. The duty of sex offenders to report quarterly to their local police stations may be analogized to the duty imposed in

a judgment of conviction on other defendants to report regularly to a probation officer or to comply with the conditions of supervised release. Such obligations are part of the punishment meted out through a defendant's criminal sentence. *United States v. Soto-Olivas*, 44 F.3d 788, 790 (9th Cir. 1995).

Moreover, the duration of the Act's requirements provides additional support for the conclusion that retribution is an objective of the Act. For offenses that are not classified as aggravated, the Act requires registration for 15 years.[8] Alaska Stat. § 12.63.020(a). However, for each year that an offender fails to comply with the registration requirements, the 15 year period is extended by an additional year. Alaska Stat. § 12.63.020(a)(2). The relationship between failing to renew the registration annually and the statute's non-punitive public safety objective – preventing recidivism – seems tenuous. On the other hand, if registration is punitive, requiring the offender actually to go to the police station and register 15 times (even if it takes more than 15 years when the offender skips some years) achieves a statutory purpose, because the penalty for the sex offense includes the requirement of annual in-person registration 15 separate times.

Finally, that the length of the reporting requirement appears to be measured by the extent of the wrongdoing, not by the extent of the risk posed, indicates that the

[8] When an offender is no longer required to register, the state removes his name from the registry, and therefore his information is no longer disclosed to the public. Alaska Stat. § 18.65.087(d)(4).

requirement is retributive. Those convicted of "aggravated" sex offenses must register four times each year for the rest of their lives, while those convicted of other sex offenses need only register annually for a period of 15 years. *See* Alaska Stat. § 12.63.020(a). However, it appears that the classification by the Alaska Sex Offender Registration Act of certain offenses as "aggravated" and others as not "aggravated" relates to the gravity of the wrongdoing, not the risk of recidivism posed by the wrongdoers. For example, the difference between first degree sexual abuse of a minor, which is an aggravated sexual offense, and second degree sexual abuse of a minor, which is not considered aggravated, is that the former prohibits someone over 16 from sexually penetrating a child under 13 while the latter prohibits someone over 16 from sexually penetrating a child between the ages of 13 and 15. *See* Alaska Stat. §§ 11.41.434; 11.41.436. This difference appears clearly to be related to the degree of wrongdoing, not the risk of recidivism.

In sum, the Act furthers the fundamental aims of punishment – retribution and deterrence. While the Act's requirements are not labeled as punishment, the nature and extent of their duration show that they serve not only as a deterrent but as retribution for the commission of sex offenses. Therefore, this *Mendoza-Martinez* factor strongly supports the conclusion that the Act's effect is punitive.

5. *Applies to criminal behavior*

That a statute applies only to behavior that is already criminal is an additional factor supporting the conclusion that its effect is punitive. *Mendoza-Martinez*, 372 U.S. at

168, 83 S.Ct. 554. As the state concedes, the Alaska statute applies only to those "convicted" of specified offenses. Alaska Stat. § 12.63.100(5).

In *Russell*, the fact that the statute applied to Washington sex offenders who were not found guilty of a crime as well as to those who were convicted was central to our conclusion that the Washington act was not punitive. 124 F.3d at 1091. Washington's statute specifically subjects sex offenders incompetent to stand trial and persons civilly committed as sexual psychopaths to its registration and notification requirements. *Id.* When considering Utah's sex offender registration and notification law, the Tenth Circuit concluded that the "criminal behavior" factor favored classification of the statute as non-punitive because it applied to those found not guilty on the ground of "mental incapacity." *Femedeer v. Haun*, 227 F.3d 1244, 1252 & n. 3 (10th Cir. 2000).

In contrast to Washington's and Utah's statute, Alaska's applies only to those found "guilty," including those found "guilty but mentally ill." Alaska Stat. § 12.63.100(3). It does *not* cover those found "not guilty by reason of insanity," or otherwise not convicted of a crime or those civilly committed.[9] *Id.* Unlike other states' sex offender registration laws, the Alaska statute's harsh requirements can be imposed only on individuals who

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[9] In Alaska, one who does not understand "the basic nature and quality of his or her conduct" is considered "not guilty by reason of insanity," while one who does not "appreciate the wrongfulness of his or her conduct" is considered "guilty but mentally ill." *Alaska v. Patterson*, 740 P.2d 944, 946-49 (Alaska 1987).

have suffered an actual criminal conviction in a court of law. Thus, this factor also provides support for the conclusion that the Act's effect is punitive.

6. *Non-punitive purpose*

The appellants concede, as they must, that there is a non-punitive purpose that can rationally be connected to the Act. That purpose, of course, is public safety, which is advanced by alerting the public to the risk of sex offenders in their communities. The existence of a non-punitive purpose for the Alaska statute, protecting public safety, unquestionably provides support, indeed the principal support, for the view that the statute is not punitive for Ex Post Facto Clause purposes.

7. *Excessiveness*

The final, and, in this case, a highly significant, factor in the *Mendoza-Martinez* analysis is whether the Alaska Sex Offender Registration Act "appears excessive in relation to the alternative purpose assigned": public safety. *Mendoza-Martinez*, 372 U.S. at 169, 83 S.Ct. 554. The appellants claim that the Act is excessive in relation to its public safety purpose because it is sweeping and overbroad in several respects. They emphasize that the scope of the statute is not limited to those who the state determines pose a future risk to the community: they point out specifically that, once convicted, it does not matter whether a defendant can prove that he has been rehabilitated and that he poses no threat of future criminal conduct. Under the statute, a judicial determination of rehabilitation (such as made in Doe I's case) is irrelevant,

and even law enforcement authorities are powerless to limit the widespread public distribution of the injurious, and possibly outdated, information that the statute provides for.

The statute at issue in *Russell* was far more limited than the Alaska statute in numerous respects. Most important to this part of our analysis, it only authorized release of "relevant and necessary information" concerning *certain* sex offenders. *Russell*, 124 F.3d at 1082. In Washington, information about sex offenders was disseminated only if the authorities determined, on an individual basis, that the offender posed a risk of recidivism. *Id.* (citing *Washington v. Ward*, 123 Wash.2d 488, 869 P.2d 1062, 1070 (1994) (en banc) (in many cases, the legislature intended that a sex offender's information would not be released to the public)). Furthermore, in *Russell*, we found it significant that Washington's statute authorized dissemination of information about any particular sex offender only within a "narrow geographic area." *Russell*, 124 F.3d. at 1082. In contrast, in Alaska, information as to all sex offenders is made available world-wide on the internet without any restriction and without regard to whether the individual poses any future risk. Broadcasting the information about all past sex offenders on the internet does not in any way limit its dissemination to those to whom the particular offender may be of concern.[10]

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[10] We note also that it does not appear that the legislature, when enacting the Alaska Sex Offender Registration Act in response to concerns about child sexual abuse, made any attempt to determine which of the offenses it classified as "sex offenses" were likely to involve recidivism (against either adults or children) and thus which should be included in order to serve the statute's non-punitive purpose – public safety. Rates of recidivism vary considerably depending on the specific sex offense committed. *See* Jane A. Small, *Who Are the People in Your Neighborhood? Due Process, Public Protection, and the Sex Offender Notification Laws*, 74 N.Y.U. L. Rev. 1451, 1458 (1999) (pedophiles, for example, have much higher rates of recidivism than other sex offenders).

With only one exception, every sex offender registration and notification law that has been upheld by a federal court of appeals has tailored the provisions of the statute to the risk posed by the offender.[11] *See Cutshall v. Sundquist*, 193 F.3d 466, 474 (6th Cir. 1999) (Tennessee statute); *Roe v. Office of Adult Probation*, 125 F.3d 47, 54 (2d Cir. 1997) (Connecticut statute); *E.B. v. Verniero*, 119 F.3d 1077, 1098 (3d Cir. 1997) (New Jersey statute); *Doe v. Pataki*, 120 F.3d 1263, 1269-70 (2d Cir. 1997) (New York statute). For example, with regard to the Connecticut statute, the Second Circuit concluded that it was not excessive because offenders who were convicted before the statute's enactment are subject to the statute's notification provisions only if, based on an "individualized

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[11] The only exception to this rule is found in an opinion that was filed after oral argument in this case, *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000). That case concerned the Utah sex offender registration and notification statute, which, like the Alaska statute, makes the state's entire sex offender registry accessible on the internet. *Id.* at 1247-48. Unlike the Alaska statute, however, the Utah database does not include employer names and addresses, and thus does not place the sex offenders' current employment in direct jeopardy. *See id.* at 1247 (reciting information contained in Utah database). In any event, we respectfully disagree with the conclusions espoused by the Tenth Circuit in *Femedeer*.

clinical assessment," they are found to pose a "high risk" of recidivism. *Roe*, 125 F.3d at 54. For offenders convicted after the statute's enactment, the court pointed out, disclosure is limited to specified members of the community, including the victim and his family, the police, the offender's immediate family, other occupants of the offender's residence, and treatment providers, unless the individual offender is determined to be "high risk." *Id.* at 50. Similarly, the Third Circuit upheld the New Jersey statute after finding that New Jersey classifies offenders by risk category, provides no public disclosure for those who pose the least risk (45 percent of offenders) and widespread disclosure only for those who pose the greatest risk (5 percent of offenders). *E.B.*, 119 F.3d at 1098.

In contrast, as we have noted, the Kansas Supreme Court considered a sex offender registration and notification statute that, like the Alaska statute, allowed unrestricted access to the registration information regardless of risk. *Kansas v. Myers*, 260 Kan. 669, 923 P.2d 1024, 1041 (1996). It concluded that the statute had a punitive effect, and therefore was an unconstitutional ex post facto law, because it was "excessive and beyond that necessary to promote public safety." *Id.* at 1043. Surveying other states' statutes, the Kansas Supreme Court concluded that almost every other state limited access by means such as: 1) basing the type of community notification on the specific risk level assigned to the individual offender (New Jersey, New York); 2) only releasing information to those living in close proximity to the offender (Louisiana); and 3) providing information only to those inquiring about a specific person (Iowa, North Carolina). *Id.* at 1029, 1038.

It based its holding that Kansas's broad notification provisions violated the Ex Post Facto Clause on its conclusion that "of the sex offender registration laws that have successfully overcome ex post facto challenges, none have [sic] provided for unlimited public access to the registered sex offender information." *Id.* at 1036.

Like the statute at issue in *Myers*, Alaska's statute is exceedingly broad. The unlimited breadth of the Alaska statute weighs strongly in favor of a determination that its effect is punitive. Indeed, the punitive effect caused by the excessiveness of the statute's provisions in relation to its non-punitive purpose is exemplified by John Doe I's case. Convicted of sexual abuse of his minor daughter, Doe I was successfully rehabilitated. After his release from prison, a state court determined that he was not a pedophile, and that he posed a very low risk of reoffending. On that basis, the court returned his minor daughter to his custody. Nevertheless, under the Alaska statute's registration provisions, Doe I would be forced to submit to in-person registration at his local police department four times a year, every year, and, under its notification provisions, he would be compelled forever to suffer the unremitting social obloquy and ostracism that would accompany his being publicly labeled a sex offender on Alaska's world-wide internet website. Presumably, in any state that does not provide for unlimited public disclosure of sex offender information in all cases in which a defendant has ever been convicted of a sex offense, the record of John Doe I's past incest conviction would not be disseminated by state officials to the world at large for the rest of his life.

8. *Conclusion*

We conclude that the *effects* of the Alaska Sex Offender Registration Act are unquestionably punitive. The impact upon the lives of those affected by the Act's requirements is drastic indeed. The Act imposes more substantial burdens on those subject to its registration and notification requirements than does any legislation enacted by any other state, the provisions of which have been considered by a federal court of appeals.

In sum, the *Mendoza-Martinez* test leads us to hold that the effects of the specific provisions of the Alaska Act provide the "clearest proof" that, notwithstanding the legislature's non-punitive intent, the statute must be classified as punitive for Ex Post Facto Clause purposes. *Hendricks*, 521 U.S. at 361, 117 S.Ct. 2072. Four of the seven factors favor this result.[12] Two factors, particularly, demonstrate that the effect of this particular statute is to increase the penalty the law provided at the time Doe I and Doe II's offenses were committed. First, there is the substantial disability imposed by the Act. The registration provisions, which require in-person registration at a local police station where registrants must provide detailed information four times each year for life in the case of some defendants, and annually for 15 years in the case of others, are extremely burdensome. This disability is exacerbated by the public notification provisions that plaintiffs' uncontradicted evidence demonstrates exposes

[12] We note that our conclusion is not based on a simple equation in which each factor is given equal weight. Rather, we consider the importance of each factor in relation to the legislative scheme we are examining.

all registrants to world-wide obloquy and ostracism. Second, unlike the sex offender registration and notification statutes upheld by the Second, Third and Sixth Circuits, as well as by this Circuit in *Russell*, the Alaska statute is excessive in relation to its non-punitive purpose. An offender cannot escape the Act's grasp no matter how clearly he may demonstrate that he poses no future risk to anyone, and no matter how final the judicial determination that he has been successfully rehabilitated; in short, under the Alaska statute, the requirements relating to disclosure of a past offense are not related to the risk posed. Furthermore, that the Act applies only to offenders who have been convicted of committing a crime and that it serves retributive and deterrent ends provides additional support for our conclusion that the Alaska statute is punitive.

Three factors suggest that the Act is not punitive. The first is the fact that sex offender registration and notification provisions have not historically been regarded as punishment. However, the fact that the Alaska statute is so much more sweeping in its scope than comparable statutes in other states leads us to limit the weight we place on this *Mendoza-Martinez* factor. The second is that it is not imposed only upon a finding of scienter. The relevance of this factor is to assist in the determination of whether the conduct giving rise to the sanction is the sort that traditionally subjects someone to punishment, because in general, *mens rea* is an element of a crime. In this case, however, given that conviction of a serious criminal offense is a prerequisite to the application of the statute, we do not believe that this factor provides much support for the conclusion that the Act is not punitive.

The final factor is the fact that the Act has a non-punitive purpose: protecting public safety. Here, we conclude that the non-punitive purpose, while of unquestioned importance, does not serve to render a statute that is so broad and sweeping non-punitive. Otherwise, we would not apply a two-part "intent-effects" test, the second part of which we reach *only* when the statute's purpose is non-punitive.

No one *Mendoza-Martinez* factor is determinative, and excessiveness, standing alone, would not be dispositive under the *Mendoza-Martinez* test. *Hudson v. United States*, 522 U.S. 93, 101, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997). Still, we place substantial weight on the fact that the Act is far more swecping than necessary to serve the purpose of promoting public safety. This is so not only with respect to the undifferentiated scope of the Act but also with respect to the severity of the disabilities it imposes. Accordingly, we conclude that, weighing all of the *Mendoza-Martinez* factors together, the effects of the Act provide the clearest proof that it is punitive.[13]

Because the Alaska Sex Offender Registration Act increases the punishment for sex offenses, the Ex Post Facto Clause limits its application to those sex offenders

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[13] We recognize that applying a multi-factor test is frequently not an entirely satisfactory method of resolving legal issues. Sometimes, however, it is the best approach available to courts. In any event, the Supreme Court has applied this approach in analogous cases, *see, e.g., Hudson*, 522 U.S. at 99, 118 S.Ct. 488, and we have held that it is applicable to statutes such as the one before us. *Russell*, 124 F.3d at 1086-87.

whose crimes were committed after its enactment. *California Dep't of Corr. v. Morales*, 514 U.S. 499, 504-05, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995). Doe I was convicted in 1985, and Doe II was convicted in 1984. The Alaska legislature enacted the Act in 1994. Therefore, the Alaska statute's application to the appellants violates the Ex Post Facto Clause.

III. APPELLANTS' OTHER CLAIMS

In addition to their Ex Post Facto Clause argument, plaintiffs claim that the statute violates their procedural and substantive Due Process Clause rights, as well as their federal constitutional privacy rights. Because we conclude that the Ex Post Facto Clause bars the application of the statute to Doe I or Doe II, we need not consider these arguments.[14] Our failure to address them should not be taken, however, as an indication that we do not believe that they have merit.[15]

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[14] In the complaint, Jane Doe I claims only that her privacy right, and not her Ex Post Facto Clause right, has been violated. Because we conclude that Jane Doe I's husband, John Doe I, is not subject to the Alaska statute, Jane Doe I will receive all of the relief that she seeks in her complaint, and therefore we need not decide whether the Act violates her privacy right.

[15] The state officials argue that our opinion in *Russell* forecloses the appellants' claims, because in that case we held that the Washington sex offender registration and notification statute does not implicate registrants' federal privacy rights. *See Russell*, 124 F.3d at 1093-94. However, in *Russell*, we made clear that the plaintiffs "fail to explain precisely how the Act violates [their privacy rights] beyond collating and releasing information." *Id.* at 1093. We then rejected their privacy argument after explaining that the mere "collection and

IV. CONCLUSION

We conclude that the Alaska Sex Offender Registration Act violates the Ex Post Facto Clause. We therefore REVERSE the district court's orders granting summary judgment for the state officials, and REMAND for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

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dissemination of information" does not violate a privacy interest or amount to a deprivation of liberty. *Id.* at 1094. In this case, plaintiffs allege more that [sic] the mere collection and release of information – they assert that the state requires them to appear four times each year at local police stations to answer a host of questions, and labels them "sex offenders" on its internet website, which is accessible world-wide. Furthermore, in contrast to the Washington statute, Alaska's brands plaintiffs sex offenders without any attempt to classify them by risk posed, or to provide them with an opportunity to prove that they have been rehabilitated. While we do not decide whether the Alaska statute infringes on the appellants' due process rights, we doubt that *Russell* fairly could be read to stand for the exceedingly broad proposition urged by the state.

UNITED STATES COURT OF APPEALS,
FOR THE NINTH CIRCUIT

No. 99-35845

JOHN DOE I, JANE DOE, AND JOHN DOE II,
PLAINTIFFS-APPELLANTS

v.

RONALD O. OTTE AND BRUCE M. BOTELHO,
DEFENDANTS-APPELLEES

[Argued and Submitted: August 1, 2000
– Anchorage, Alaska
Opinion Filed: April 9, 2001]

Before: D.W. NELSON, REINHARDT and THOMAS, Circuit Judges

Opinion by Judge REINHARDT

REINHARDT, Circuit Judge:

This case involves an extremely sensitive and difficult question, both from a social and legal standpoint. How may society deal with convicted sex offenders *after* they have been punished for their crimes? How can society protect itself against future offenses and at the same time safeguard the constitutional rights of persons who have fully paid the price imposed by law for their crimes? The issues treated in the Alaska Sex Offender Registration Act we consider here differ only in degree from a host of other issues the citizens of this country regularly

face in trying to resolve the inherent tensions between safety and freedom that exist in any democracy.

As it turns out, we can decide the case before us without having to resolve the most fundamental question posed by the Alaska statute: that is, in light of the fundamental liberty interest protected by the Due Process Clause, may rehabilitation, or a judicial determination of lack of future risk, be wholly ignored when imposing restrictive requirements and obligations on persons who have committed a sexual offense and been fully punished for their crimes? Instead, we base our decision on a far narrower constitutional provision, the Ex Post Facto Clause.

The plaintiffs in this action are convicted sex offenders who have completed their sentences. They claim that Alaska's sex offender registration and notification statute, enacted after their convictions, both constitutes an ex post facto law and violates their Due Process rights. U.S. Const. Article I, § 10; Amend. 14. Because we conclude that, as to defendants whose crimes were committed before its enactment, the Alaska statute violates the Ex Post Facto Clause, we do not resolve the question whether it also violates the Due Process Clause.

The Ex Post Facto Clause serves two purposes: it requires fair notice, and, particularly relevant to the Alaska statute, it acts to "restrai[n] arbitrary and potentially vindictive legislation." *Weaver v. Graham*, 450 U.S. 24, 29, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138, 3 L.Ed. 162 (1810) (the Ex Post Facto Clause checks "the violent acts which might grow out of the feelings of the moment"). Convicted sex

offenders have good reason to fear vindictive legislation. Their crimes are viewed by society as an affront to the institution of the family. More important, many of us fear that upon their release, sex offenders will prey on our children and those of our neighbors.

The Ex Post Facto Clause expresses our commitment to constrain the manner in which legislatures can address intense fears of the type evoked by the return to the community of convicted sex offenders. However, its check on legislative power is quite limited – it merely requires that punishment be prospectively imposed. Because the Alaska Sex Offender Registration Act does not comply with this minimal protection, we hold that it may not be applied to persons whose crimes were committed before its enactment.

I. BACKGROUND

A. *Factual background*

On May 12, 1994, Alaska enacted the Alaska Sex Offender Registration Act (sometimes referred to in this opinion as "the Act" or "the Alaska statute"), which requires convicted sex offenders to register with law enforcement authorities and authorizes public disclosure of information in the sex offender registry. 1994 Alaska Sess. Laws 41. In its implementing regulations, Alaska provides that it will, in all cases, post the information from the registry for public viewing in print or electronic form, so that it can be used by "any person" "for any purpose." Alaska Admin. Code tit. 13, § 09.050(a) (2000). Upon passage of the Act, two men required to register, John Doe I and John Doe II, as well as John Doe I's wife,

immediately brought a 42 U.S.C. § 1983 action against the state commissioner for public safety and state attorney general to enjoin its enforcement.

In 1985, nine years before the Alaska statute was enacted, Doe I had entered a plea of nolo contendere to a charge of sexual abuse of a minor after a court determined that he had sexually abused his daughter for two years while she was between the ages of nine and eleven. He was sentenced to twelve years incarceration, of which four years were suspended; he was released from prison in 1990. After being released, Doe I was granted custody of his daughter, based on a court's determination that he had been successfully rehabilitated. In making its determination, the court relied, in part, on the findings of psychiatric evaluations concluding that Doe I has "a very low risk of re-offending" and is "not a pedophile." Also, since his release, Doe I married Jane Doe,who was aware of Doe I's conviction for a sex offense.

Jane Doe is a registered nurse in Anchorage, and is well known in the medical community there. She alleges that disclosure of her husband's criminal background will "undermine [her] professional relationships," and her ability to obtain and care for patients.

The third plaintiff, John Doe II, entered a plea of nolo contendere on April 8, 1984 to one count of sexual abuse of a minor for sexual abuse of a 14-year-old child. He was sentenced to eight years in prison, released in 1990, and subsequently completed a two-year program for the treatment of sex offenders.

B. *Prior Proceedings*

The plaintiffs filed a complaint in the district court claiming that the Alaska statute violates their federal and state constitutional rights and sought leave to proceed under pseudonyms. The district judge granted a preliminary injunction requiring the plaintiffs to register under the act but prohibiting public disclosure of the registration information; at the same time he denied their request to proceed under pseudonyms. *See Rowe v. Burton*, 884 F.Supp. 1372, 1388 (D.Alaska 1994).[1] The plaintiffs appealed the denial of their use of pseudonyms, and we dismissed the appeal because no final judgment had been entered. On remand, the district judge dismissed the complaint when the plaintiffs would not amend it to include their real names. The plaintiffs appealed the dismissal, and this court reversed, holding that the plaintiffs could proceed under pseudonyms.

With the nomenclature issue resolved, the parties in 1998 filed cross-motions for summary judgment. A different district judge granted the state's motion, and this appeal followed.[2]

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[1] When the complaint was filed, Doe I used the pseudonym "James Rowe." However, the court subsequently changed his pseudonym to "John Doe I" after an individual named James Rowe complained that he was suffering ill effects from Doe's use of the name in this matter.

[2] We offer no comment on the tortured course of the proceedings in this case or the fact that it is now seven years since the Alaska statute was enacted. We observe only that we now add to this judicial odyssey by deciding the case on the narrower of the two constitutional grounds, as that affords appellants all the relief they seek. The question whether the

C. *The Alaska Sex Offender Registration Act*

The Alaska Sex Offender Registration Act was enacted at a time when the state legislature perceived that Alaska's high rate of child sexual abuse constituted a "crisis." Legislators heard testimony that Alaska's rate of child sexual abuse was the highest in the country, that one-fourth of Alaska's prison inmates were incarcerated for sexual offenses, and that in 1993, one hundred sex offenders were scheduled for release from prison. On May 12, 1994, Alaska enacted its sex offender registration statute, and subsequently amended it in 1998 and 1999. 1998 Alaska Sess. Laws 81 & 106 (adding crimes to the list of "sex offenses" requiring registration); 1999 Alaska Sess. Laws 54 (defining "conviction").

The Alaska statute has two main components: it requires sex offender registration, with criminal penalties for failure to register, and it authorizes full disclosure of information about all offenders to the public. The registration provisions require persons convicted of a broad range of offenses against children and adults to register in person with local police authorities. Such offenses include, for example, sexual assault and possession of child pornography.[3]

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statute offends the rights of persons whose crimes were committed after its enactment will have to wait for another day.

[3] Other offenses include child kidnaping, felony sexual assaults, sexual abuse of a minor, incest, unlawful exploitation of a minor, promoting or forcing a minor to engage in prostitution, distribution of child pornography, felony indecent exposure, and misdemeanor indecent exposure where the victim is under 16 and the defendant has a prior conviction for certain offenses. Alaska Stat. § 12.63.100.

Alaska Stat. § 12.63.100(1)(B). Registrants must be photographed, provide fingerprints, and provide the following information: name, date of birth, address, place of employment, and information about the conviction (specifically the crime, date of conviction and place of conviction). Alaska Stat. § 12.63.010. Those convicted of "aggravated" sex offenses must register in person at their local police stations four times each year for life; those convicted of other sex offenses must register in person annually for fifteen years. Alaska Stat. § 12.63.020.

Information collected under the Alaska Sex Offender Registration Act is forwarded to the Alaska Department of Public Safety, which maintains a central registry. Alaska Stat. § 18.65.087. The parties agree that the Department of Public Safety has published the collected information on its internet website, making it readily available to all persons world-wide. The information on the website, which can be searched by name, partial address, zip code or city, includes the offender's name, color photograph, physical description, street address, employer address and conviction information, all under the banner "Registered Sex Offender."

II. EX POST FACTO CLAIM

The Ex Post Facto Clause prohibits states from enacting any law that "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391, 1 L.Ed. 648 (1798). There is no question that the Alaska statute, by its terms, applies to the plaintiffs even though

their crimes were committed before its enactment. However, the question when considering whether a retroactively applicable statute is subject to the constraints of the Ex Post Facto Clause is not whether it "produces some ambiguous sort of 'disadvantage,' . . . but . . . whether [it] . . . increases the penalty by which a crime is punishable." *California Dep't of Corr. v. Morales*, 514 U.S. 499, 506 n. 3, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995). The key issue in this case is whether or not the Act is punitive, because only punitive statutes implicate the Ex Post Facto Clause.

Whether a statute should be classified as imposing punishment involves a two-step inquiry. We must first consider whether, when enacting the Act, the Alaska legislature "indicated either expressly or impliedly a preference for one label or the other." *United States v. Ward*, 448 U.S. 242, 248, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980). If we conclude that the legislature's intent was punitive, our inquiry is at an end. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963). If we conclude that the legislature did not intend the statute to be considered punitive, or that its intent is ambiguous, then we must inquire whether the statute is "so punitive either in purpose or effect" that it should be considered to constitute punishment. *Ward*, 448 U.S. at 249, 100 S.Ct. 2636. This two-step inquiry is known as the "intent-effects test."[4] *Russell v. Gregoire*, 124 F.3d 1079, 1086 (9th Cir.1997).

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[4] The test is somewhat confusing, because the "effects" prong includes an exploration into both the effects of the statute and its actual purpose. The legislature's purpose is, of course, necessarily considered in the examination conducted under the first prong (the intent prong) of the test.

In other Ex Post Facto challenges to state sex offender registration and notification laws, some courts of appeals have analyzed separately the registration and notification provisions while others have looked to the statute as a whole. *Compare Russell*, 124 F.3d at 1087, 1089 (separately considering the registration and notification provisions); *Doe v. Pataki*, 120 F.3d 1263, 1276 (2d Cir.1997) (same) *with Cutshall v. Sundquist*, 193 F.3d 466, 473-76 (6th Cir.1999) (considering registration and notification provisions together). The Alaska legislature enacted the Alaska statute as a single piece of legislation, and the notification and registration provisions operate in tandem. Neither the structure of the statute nor the excerpts of the legislative debate included in the record indicate that the provisions were viewed as serving separate purposes. Nor does the state suggest on this appeal that the provisions should be treated separately for purposes of our constitutional analysis. Moreover, an Alaska intermediate appellate court recently considered the statute as a whole when deciding an Ex Post Facto challenge. *See Patterson v. Alaska*, 985 P.2d 1007, 1011-13 (Alaska Ct.App.1999). After reviewing the structure of the statute and its legislative history, we agree with the Alaska court that the proper approach is to analyze the statute as a whole.[5]

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[5] *Patterson* concluded that neither the intent nor the effects of the Alaska statute were punitive. *Patterson*, 985 P.2d at 1013. Determining "whether a particular [statute] is civil or criminal is a matter of statutory construction." *Ward*, 448 U.S. at 248, 100 S.Ct. 2636. While we regard as "authoritative" the construction of a statute rendered by the state's highest court, *Russell*, 124 F.3d at 1090, we are *not* obligated to adopt that court's legal conclusion with regard to whether a legislature's purpose in enacting a statute is to punish. *Kansas v. Hendricks*, 521 U.S. 346,

A. *Intent of the Alaska Sex Offender Registration Act*

To determine the legislature's intent when enacting the Alaska Sex Offender Registration Act, we consider the body's declared purpose, the structure of the statute, and its design. *Russell*, 124 F.3d at 1087. Here, this examination produces conflicting signals as to whether the legislature intended the Act to be regarded as punitive.

One factor recently relied upon by the Supreme Court in determining whether a legislature intended a statute to be considered punitive is the statute's placement in the state code. When considering a civil commitment statute for sexual predators, the Court explained that the state's intent was not punitive on the basis of the fact that the provision was placed in the state's civil code, rather than in its criminal code. *Kansas v. Hendricks*, 521 U.S. 346, 361, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997); *see Femedeer v. Haun*, 227 F.3d 1244, 1249 (10th Cir.2000); *but see Cutshall v. Sundquist*, 193 F.3d 466, 474 (6th Cir.1999) ("location within criminal procedure laws does not necessarily indicate an intent on the part of the legislature to punish"); *Doe v. Pataki*, 120 F.3d 1263, 1277-78 (2d Cir.1997) (finding intent of statute non-punitive although

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365, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). In other words, we defer to a state highest court's determination concerning what the statute means, but we determine independently whether that meaning renders a statute punitive or not. Of course, we are not obliged to accept the *Patterson* court's construction of the Alaska statute because *Patterson* is not a decision of the Alaska Supreme Court. While we find some of its analysis persuasive, we ultimately reach the opposite conclusion as to whether, for Ex Post Facto purposes, the statute should be considered punitive.

it is placed in the state code's "Corrections Law" volume). The Alaska statute's placement provides conflicting signals as to whether the legislature intended it to be regarded as punitive.

The legislature codified the registration portion of the Act within Title 12 of the Alaska Code, which is entitled "Criminal Procedure," while codifying the notification provisions in Title 18, entitled "Health, Safety and Housing." If the statute were intended to be regarded as a non-punitive public safety measure, one would expect that it would have been placed entirely within the title of the Alaska code governing "Safety": Title 18. Title 18 includes chapters concerning sexual assault investigations (chapter 68); police protection (chapter 65); and even a registration provision (chapter 75, concerning licensing and control of dogs). Placement of the sex offender act's registration provisions in Title 12, suggests that the legislature was more concerned with the fact that the offenders are convicted criminals than with public safety administration.[6]

While the placement of the Act within the Alaska's code provides some evidence that it was, at least in part, intended to be punitive, two aspects of its design, in particular, provide much stronger evidence of punitive intent. The Act requires that when a defendant is sentenced for a sex offense, the registration and notification provisions are to be made a part of the criminal judgment against him. 1994 Alaska Sess. Laws 41, § 11. Alaska

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[6] However, the fact that the notification provisions are placed in Title 18 suggests that the legislature's intent may have been non-punitive.

criminal judgments must include the defendant's plea, the verdict or findings, and the adjudication and sentence. Alaska Rule of Crim. P. 32(b). In the case of someone convicted of a sexual offense, "the written judgment must [also] set out the requirements of [the Act]." Alaska Rule of Crim. P. § 32(c). Directing courts to include the registration and notification requirements of the Act in judgments evinces an intent that the application of its provisions to the defendant be regarded as part of his punishment for the crime, because the purpose of the judgment is to set forth the crime and punishment.[7]

Furthermore, the Act amends the state's rules of criminal procedure to compel judges to advise defendants about the Act's requirements before accepting guilty pleas. Alaska Rule of Crim. P. § 11(c). Making notice of the registration requirements a prerequisite for an informed guilty plea strongly suggests that the legislature

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[7] It could be argued that the legislature ordered courts to notify defendants of the Act's provisions when they are convicted simply as a means of providing notice to the defendants of its requirements. However, this argument ignores the fact that the "notice" is made part of the judgment, which is the legal statement of punishment. The Rule 32(b) requirements do not require judgments to contain any information except that relating to the crime and the punishment for the crime, even though notice of other facts usefully could be communicated at that time. For example, the rule does not require notice of the right to appeal as part of the judgment. Such notice must be given by the judge at the time of sentencing, but it is not part of the official judgment against the defendant. Alaska Rule of Crim. P. § 32.5. While the defendant only has thirty days to file an appeal, if he is incarcerated at the time of conviction, he need not register as a sex offender until 30 days before he is released from prison. Rule 32.5; Alaska Stat. § 12.63.010(a)(1) (1999).

acknowledges that the requirements constitute punishment.

While the structure and design of the statute indicate that it is intended to be regarded as punitive, the Act's legislative findings indicate otherwise. Section 1 of the Alaska statute states:

> "The legislature finds that
>
> (1) sex offenders pose a high risk of reoffending after release from custody;
>
> (2) protecting the public from sex offenders is a primary governmental interest;
>
> (3) the privacy interests of persons convicted of sex offenses are less important than the government's interest in public safety; and
>
> (4) release of certain information about sex offenders to public agencies and the general public will assist in protecting public safety."

1994 Alaska Sess. Laws 41, § 1.

These findings indicate that the legislature viewed the Act as a measure designed to accomplish a non-punitive purpose – protection of the public through the collection and release of information. *Patterson*, 985 P.2d at 1011 (findings make clear that legislature viewed "recidivism of sex offenders [as] a problem," and sought to address the problem through "the release of certain information").

We recently considered whether Washington's sex offender registration statute violated the Ex Post Facto Clause. *See Russell v. Gregoire*, 124 F.3d 1079 (9th Cir.1997). In *Russell*, we determined that Washington's far more

narrowly drawn and limited statute did not violate that Clause because it could not be considered punitive. *Id.* at 1089, 1093. We looked to legislative findings that included a statement that it is Washington's policy to better enable law enforcement "to protect their communities by regulating sex offenders," and found that statement conclusive of the fact that the intent of the law was regulatory, not punitive. 124 F.3d at 1087. In the present case, however, while the legislative findings provide some support for the proposition that the Act is not intended to be punitive, the findings are by no means conclusive. Here, as we have explained above, unlike the Washington statute, the structure and design of the Alaska Act support the contrary conclusion: that the legislature intended that the statute be punitive.

Having carefully considered both the legislative findings and the statute's structure and design, we conclude that the Alaska legislature has not clearly expressed its intent as to whether or not the Act should be considered punitive. Thus, we now turn to the "effects" prong.

B. *The Alaska Statute's Punitive Effect*

When a legislature plainly states its intent that a statute is *not* punitive, courts must "reject the legislature's manifest intent only where a party challenging the statute provides the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the State's intention." *Hendricks*, 521 U.S. at 361, 117 S.Ct. 2072 (internal quotations omitted); *Russell*, 124 F.3d at 1087. In this case, however, because we have

concluded that the legislative intent is unclear, the "clearest proof" test does not apply and, in examining the statute's effects, we apply ordinary and customary legal standards. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963).

Mendoza-Martinez instructs us to consider seven factors when applying the effects prong of the two-step test. *Id.* ("[a]bsent conclusive evidence of congressional intent as to the penal nature or a statute, [the seven factors listed below] must be considered in relation to the statute on its face").

1) whether the sanction involves an affirmative disability or restraint;

2) whether it has historically been regarded as a punishment;

3) whether it comes into play only on a finding of scienter;

4) whether its operation will promote the traditional aims of punishment – retribution and deterrence;

5) whether the behavior to which it applies is already a crime;

6) whether an alternative purpose to which it may rationally be connected is assignable to it; and

7) whether it appears excessive in relation to the alternative purpose assigned.

Mendoza-Martinez, 372 U.S. at 168-69, 83 S.Ct. 554.

We applied these factors in *Russell* in order to determine whether Washington's narrowly drawn and strictly limited sex offender registration statute violated the Ex Post Facto Clause, and we held that it did not. *Russell*, 124 F.3d at 1089, 1093. Here, the application of the seven factors leads us to the conclusion that Alaska's statute, which is far broader and far more punitive in nature than Washington's, *is* designed to punish sex offenders, and thus does offend the Ex Post Facto Clause.[8]

1. *Affirmative disability or restraint*

The Alaska Sex Offender Registration Act imposes an affirmative disability on the plaintiffs. First, its registration provisions impose a significant affirmative disability by subjecting offenders to onerous conditions that in some respects are similar to probation or supervised release. Like Washington's sex offender registration statute, Alaska's requires offenders being released from confinement to register. Alaska Code § 12.63.010(a); *Russell*, 124 F.3d at 1082. However, unlike the Washington statute, Alaska's requires sex offenders such as the plaintiffs to re-register at police stations four times each year every year of their lives. Alaska Code § 12.63.010(d). Moreover, in order to do so, they must appear in person at a police station on each occasion, and provide, under oath, a wide

[8] As we noted, *supra*, in *Russell* we required a showing of the "clearest proof" because we determined that the legislature's manifest intent was that the statute not be deemed punitive, while here, because the legislative intent is unclear, we do not apply so burdensome a standard.

variety of personal information, including address, anticipated change of address, employer address, vehicle description, and information concerning mental health treatment for any "mental abnormality or personality disorder." § 12.63.010(b).

In *Russell*, we concluded that Washington's registration provisions did not impose an affirmative disability or restraint. *Russell*, 124 F.3d at 1088-89. However, as the state acknowledges, Alaska's registration requirement is vastly more burdensome than the one-time registration requirement at issue in *Russell*. We held in *Russell* that Washington's "simple registration" provision, involving a one-time only registration (except when changing one's address), does not work an affirmative disability or restraint. *Russell*, 124 F.3d at 1082, 1088. In part because Alaska's registration provision is far more onerous, we reach a different conclusion here.

Not only do the Alaska statute's registration provisions impose an affirmative disability, but its notification provisions do so as well. By posting the appellants' names, addresses, and employer addresses on the internet, the Act subjects them to community obloquy and scorn that damage them personally and professionally. For example, the record contains evidence that one sex offender subject to the Alaska statute suffered community hostility and damage to his business after printouts from the Alaska sex offender registration internet website were publicly distributed and posted on bulletin boards.

In reviewing a sex offender law that authorized public inspection of sex offender records at police departments and permitted newspapers or others to

disseminate the information, the Kansas Supreme Court concluded that the law imposed a disability because "[t]he practical effect of such unrestricted dissemination could make it impossible for the offender to find housing or employment." *Kansas v. Myers*, 260 Kan. 669, 923 P.2d 1024, 1041 (1996). Where the impact is substantially less severe, however, the disability is not such as to warrant a finding that the statute is punitive. Such was the conclusion in *Cutshall*, 193 F.3d at 471, where a Tennessee statute limited disclosure of information to the amount "deemed necessary . . . to protect the public concerning a specific sexual offender," and in *Pataki*, 120 F.3d at 1269-70, where a New York act permitted such disclosure only on the basis of an individualized assessment of the risk of recidivism. Alaska's system of posting all sex offenders' information on the internet is far closer to the statutory scheme in *Myers* and, in fact, is likely to have a far greater impact on offenders. Because the internet is much more accessible to the public than records at police departments, the obloquy and scorn noted in *Myers* are more certain to result.

A statute also may be considered non-punitive where the specific disability is narrow. In *Hudson v. United States*, 522 U.S. 93, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997), the Supreme Court held that a sanction of "occupational debarment" from the banking industry for those found to have misappropriated bank funds is not an "affirmative disability or restraint" because the disability is severely limited. *Hudson*, 522 U.S. at 104, 118 S.Ct. 488. In contrast, in the present case, the procedures employed under the Alaska statute are likely to make the plaintiffs *completely* unemployable. Alaska publishes the names and addresses

of the registrants' places of employment on its sex offender internet site, and makes it simple for users of the site to search for the presence of any sex offenders working at a particular place of employment. By doing so, it creates a substantial probability that registrants will not be able to find work, because employers will not want to risk loss of business when the public learns that they have hired sex offenders. This disability is far more substantial than the one at issue in *Hudson*, which merely involved debarment from a single profession. Indeed, the breadth of the impact of the Alaska statute provides strong evidence that the statute's effect is punitive. *See Myers*, 923 P.2d at 1041 (sex offender statute that permits public disclosure of offender's employment information imposes an affirmative disability).

The state argues that *Russell* compels the conclusion that the Alaska statute's notification provisions do not impose an affirmative disability. As noted earlier, however, *Russell* involved a statute with a far more limited notification provision. The Washington statute we considered in *Russell* authorizes release of information only when it has been determined that the specific offender poses a risk of reoffending, and even then, the information disclosed is much more limited than the information Alaska discloses. *Russell*, 124 F.3d at 1082. Furthermore, under the Washington act, disclosure is limited to a narrow geographic area within the state of Washington, whereas here the notification of a defendant's lurid past is world-wide. *Id.* Moreover, when considering whether Washington's limited notification provisions posed an

affirmative disability, we "actively weigh [ed]" the harsh results of the community notification provisions, including "humiliation, ostracism, public opprobrium, and the loss of job opportunities," but decided that the disability was not "so egregious" as to prevent the court from concluding that the statute was regulatory. *Russell*, 124 F.3d at 1092.

In *Russell*, therefore, we *did* determine that the notification provisions imposed an affirmative disability. We made this clear by "actively weighing" the statute's consequences along with the other *Mendoza-Martinez* factors. We ultimately concluded, however, that the disability was insufficient to overcome the clear legislative intent that the statute not be punitive, particularly in light of some of the other relevant *Mendoza-Martinez* factors and the applicability of the "clearest proof" standard.

Considered as a whole, the Alaska statute's registration and notification provisions, impose a significant disability on the plaintiffs. Both the registration and notification provisions are far more burdensome than the provisions we considered in *Russell*. Moreover, the standard of proof we apply here is different than in our earlier case. When the applicable provisions of the Alaska statute are considered together, the first *Mendoza-Martinez* factor clearly favors treating the Act as punitive.

2. *Historical treatment*

Sex offender registration and notification statutes are of fairly recent origin.[9] Other courts considering such statutes consider whether they are analogous to historical shaming punishments. In *Russell*, we concluded that the provisions of the Washington statute were not. *Russell*, 124 F.3d at 1092. We reach the same conclusion here. Accordingly, the second factor favors treating the statute as non-punitive.

3. *Finding of scienter*

The third *Mendoza-Martinez* factor is whether the statute's provisions come into effect only upon a finding of scienter. *Mendoza-Martinez*, 372 U.S. at 168, 83 S.Ct. 554. A defendant must be convicted of a sex offense before the Alaska statute's provisions become applicable, and those offenses generally require a finding of scienter. However, some of the offenses that subject an offender to the Act's requirements are "strict liability" offenses that can be committed whether or not the defendant is aware of certain facts that make his conduct criminal. For example, conviction for sexual abuse of a minor under 13 years of age does not require any showing that the defendant

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[9] The first sex offender community notification statute was enacted by Washington in 1990. Alan R. Kabat, Note, *Scarlet Letter Sex Offender Databases and Community Notification: Sacrificing Personal Privacy for a Symbol's Sake*, 35 Am.Crim. L.Rev. 333, 334-35 (1998). After the 1994 killing of Megan Kanka in New Jersey, such statutes became widespread. *Id.*

knows that his victim is under that age. Alaska Stat. §§ 11.41.434; 11.41.445(b).

Our inquiry when considering this factor is whether the Act's requirements may be imposed *only* upon a finding a scienter. *Hudson*, 522 U.S. at 104, 118 S.Ct. 488. While the Alaska statute generally requires a finding of scienter, its provisions do not become applicable *only* in such circumstance. Accordingly, like the second *Mendoza-Martinez* factor, this factor supports the conclusion that the Act is not punitive.

4. *Traditional aims of punishment*

When a statute promotes the traditional aims of punishment – retribution and deterrence, its effect is more likely to be considered punitive. *Id.* This court has previously held that Washington's statute, which is substantially less onerous than Alaska's, "may implicate deterrence," *Russell*, 124 F.3d at 1091, and the *Patterson* court reached the same conclusion with regard to the Alaska statute. *Patterson*, 985 P.2d at 1012. Accordingly, we conclude that the Act may provide a measure of deterrence; the threat of being subjected to mandatory registration and, particularly, publicly branded a sex offender, may presumably deter some persons who might otherwise become offenders.

While the Alaska statute may have some deterrent effect, it even more directly serves the other traditional aim of punishment – retribution. It is primarily this objective that causes us to weigh the fourth factor on the side of finding the Act punitive. When the *Russell* court determined that the Washington statute was not retributive, it

relied in part on the fact that the effect of the statute was not to "labe[l] the offender as more culpable than before." 124 F.3d at 1091. The Alaska statute, in contrast, mandates inclusion of the registration requirements in judgments of conviction, which are the formal documents in which the state describes the defendant's culpability. Alaska Rule of Crim. P. § 32(c). As part of their sentences, sex offenders are notified that, included with the punishment is the obligation to comply with the provisions of the Alaska Sex Offender Registration Act.

Furthermore, the Act's registration obligations imposed on sex offenders appear to be inherently retributive. The duty of sex offenders to report quarterly to their local police stations may be analogized to the duty imposed in a judgment of conviction on other defendants to report regularly to a probation officer or to comply with the conditions of supervised release. Such obligations are part of the punishment meted out through a defendant's criminal sentence. *United States v. Soto-Olivas*, 44 F.3d 788, 790 (9th Cir.1995).

Moreover, the duration of the Act's requirements provides additional support for the conclusion that retribution is an objective of the Act. For offenses that are not classified as aggravated, the Act requires registration for 15 years.[10] Alaska Stat. § 12.63.020(a). However, for each year that an offender fails to comply with the registration

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[10] When an offender is no longer required to register, the state removes his name from the registry, and therefore his information is no longer disclosed to the public. Alaska Stat. § 18.65.087(d)(4).

requirements, the 15 year period is extended by an additional year. Alaska Stat. § 12.63.020(a)(2). The relationship between failing to renew the registration annually and the statute's non-punitive public safety objective – preventing recidivism – seems tenuous. On the other hand, if registration is punitive, requiring the offender actually to go to the police station and register 15 times (even if it takes more than 15 years when the offender skips some years) achieves a statutory purpose, because the penalty for the sex offense includes the requirement of annual in-person registration 15 separate times.

Finally, that the length of the reporting requirement appears to be measured by the extent of the wrongdoing, not by the extent of the risk posed, indicates that the requirement is retributive. Those convicted of "aggravated" sex offenses must register four times each year for the rest of their lives, while those convicted of other sex offenses need only register annually for a period of 15 years. *See* Alaska Stat. § 12.63.020(a). However, it appears that the classification by the Alaska Sex Offender Registration Act of certain offenses as "aggravated" and others as not "aggravated" relates to the gravity of the wrongdoing, not the risk of recidivism posed by the wrongdoers. For example, the difference between first degree sexual abuse of a minor, which is an aggravated sexual offense, and second degree sexual abuse of a minor, which is not considered aggravated, is that the former prohibits someone over 16 from sexually penetrating a child under 13 while the latter prohibits someone over 16 from sexually penetrating a child between the ages of 13

and 15. *See* Alaska Stat. §§ 11.41.434; 11.41.436. This difference appears clearly to be related to the degree of wrongdoing, not the risk of recidivism.

In sum, the Act appears to further the fundamental aims of punishment – retribution and deterrence. While the Act's requirements are not labeled as punishment, their inclusion in the criminal judgment and the nature and extent of their duration suggest that they serve as retribution for the commission of sex offenses. Furthermore, this court has previously recognized that sex offender registration and notification laws may deter those inclined to commit (at least some) sex offenses. *See Russell*, 124 F.3d at 1091. Therefore, this *Mendoza-Martinez* factor supports the conclusion that the Act's effect is punitive.

5. *Applies to criminal behavior*

That a statute applies only to behavior that is already criminal is an additional factor supporting the conclusion that its effect is punitive. *Mendoza-Martinez*, 372 U.S. at 168, 83 S.Ct. 554. As the state concedes, the Alaska statute applies only to those "convicted" of specified offenses. Alaska Stat. § 12.63.100(5).

In *Russell*, the fact that the statute applied to Washington sex offenders who were not found guilty of a crime as well as to those who were convicted was central to our conclusion that the Act was not punitive. 124 F.3d at 1091. Washington's statute specifically subjects sex offenders incompetent to stand trial and persons civilly committed as sexual psychopaths to its registration and

notification requirements. *Id.* When considering Utah's sex offender registration and notification law, the Tenth Circuit concluded that the "criminal behavior" factor favored classification of the statute as non-punitive because it applied to those found not guilty on the ground of "mental incapacity." *Femedeer*, 227 F.3d at 1252 & n. 3.

In contrast to Washington's and Utah's statute, Alaska's applies only to those found "guilty," including those found "guilty but mentally ill." Alaska Stat. § 12.63.100(3). It does *not* cover those found "not guilty by reason of insanity," or otherwise not convicted of a crime or those civilly committed.[11] *Id.* Unlike other states' sex offender registration laws, the Alaska statute's harsh requirements can be imposed only on individuals who have suffered an actual criminal conviction in a court of law. Thus, this factor also provides support for the conclusion that the Act's effect is punitive.

6. *Non-punitive purpose*

The appellants concede, as they must, that there is an alternative non-punitive purpose, as well as a punitive one, that can rationally be connected to the Act. That purpose, of course, is public safety, which is advanced by

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[11] In Alaska, one who does not understand "the basic nature and quality of his or her conduct" is considered "not guilty by reason of insanity," while one who does not "appreciate the wrongfulness of his or her conduct" is considered "guilty but mentally ill." *Alaska v. Patterson*, 740 P.2d 944, 946-49 (Alaska 1987).

alerting the public to the risk of sex offenders in their communities. The existence of a non-punitive alternative purpose for the Alaska statute, protecting public safety, unquestionably provides support, indeed the principal support, for the view that the statute is not punitive for Ex Post Facto Clause purposes.[12]

7. *Excessiveness*

The final, and, in this case, a highly significant, factor in the *Mendoza-Martinez* analysis is whether the Alaska Sex Offender Registration Act "appears excessive in relation to the alternative purpose assigned": public safety. *Mendoza-Martinez*, 372 U.S. at 169, 83 S.Ct. 554. The appellants claim that the Act is excessive in relation to its public safety purpose because it is sweeping and excessive in several respects. They emphasize that the scope of

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[12] *Russell* states in dictum that even if the non-punitive purpose were merely ancillary to the overriding punitive purpose of the statute, we may still conclude that the statute is not punitive, presumably on the basis of a clear legislative intent and an assessment of the other *Mendoza-Martinez* factors. *See Russell*, 124 F.3d at 1086. We need not examine that dictum here, because in the present case, the legislative intent is unclear and the other factors, taken as a whole, support the conclusion that the Act is punitive. We note, moreover, that under *Mendoza-Martinez*, the finding that an alternative non-punitive purpose exists, ancillary or not, clearly does not end the inquiry. Rather, in such cases, the court must proceed to determine, inter alia, whether the alternative purpose "appears excessive in relation to the alternative purpose." *Mendoza-Martinez*, 372 U.S. at 169, 83 S.Ct. 554. We undertake that step in the analysis in the subsection of the text that immediately follows.

the statute is not limited to those who the state determines pose a future risk to the community: they point out specifically that, once convicted, it does not matter whether a defendant can prove that he has been rehabilitated and that he poses no threat of future criminal conduct. Under the statute, a judicial determination of rehabilitation (such as made in Doe I's case) is irrelevant, and even law enforcement authorities are powerless to limit the widespread public distribution of the injurious, and possibly outdated, information that the statute provides for.

The statute at issue in *Russell* was much more limited than the Alaska statute in numerous respects. Most important to this part of our analysis, it only authorized release of "relevant and necessary information" concerning *certain* sex offenders. *Russell*, 124 F.3d at 1082. In Washington, information about sex offenders was disseminated only if the authorities determined, on an individual basis, that the offender posed a risk of recidivism. *Id.* (citing *Washington v. Ward*, 123 Wash.2d 488, 869 P.2d 1062, 1070 (1994) (en banc) (in many cases, the legislature intended that a sex offender's information would not be released to the public)). Furthermore, in *Russell*, we found it significant that Washington's statute authorized dissemination of information about any particular sex offender only within a "narrow geographic area." *Russell*, 124 F.3d. at 1082. In contrast, in Alaska, information as to all sex offenders is made available world-wide on the internet without any restriction and without regard to whether the individual poses any future risk. Broadcasting the information about all past sex offenders on the internet does not in any way limit its dissemination to

those to whom the particular offender may be of concern.[13]

With only one exception, every sex offender registration and notification law that has been upheld by a federal Court of Appeals has tailored the provisions of the statute to the risk posed by the offender.[14] *See Cutshall v. Sundquist*, 193 F.3d 466, 474 (6th Cir.1999) (Tennessee statute); *Roe v. Office of Adult Probation*, 125 F.3d 47, 54 (2d Cir.1997) (Connecticut statute); *E.B. v. Verniero*, 119 F.3d 1077, 1098 (3d Cir.1997) (New Jersey statute); *Doe v. Pataki*, 120 F.3d 1263, 1269-70 (2d Cir.1997) (New York statute). For example, with regard to the Connecticut

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[13] We note also that it does not appear that the legislature, when enacting the Alaska Sex Offender Registration Act in response to concerns about child sexual abuse, made any attempt to determine which of the offenses it classified as "sex offenses" were likely to involve recidivism (against either adults or children) and thus which should be included in order to serve the statute's non-punitive purpose – public safety. Rates of recidivism vary considerably depending on the specific sex offense committed. *See* Jane A. Small, *Who Are the People in Your Neighborhood? Due Process, Public Protection, and the Sex Offender Notification Laws*, 74 N.Y.U. L.Rev. 1451, 1458 (1999) (pedophiles, for example, have much higher rates of recidivism than other sex offenders).

[14] The only exception to this rule is found in an opinion that was filed after oral argument in this case, *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir.2000). That case concerned the Utah sex offender registration and notification statute, which makes the state's entire sex offender registry accessible on the internet. *See id.* at 1247-48. In that case, unlike here, the Tenth Circuit examined whether the "clearest proof" demonstrated that the effects of the statute were punitive, because the Utah legislature's manifest intent was that the statute be regarded as non-punitive. *Id.* at 1249.

statute, the Second Circuit concluded that it was not excessive because offenders who were convicted before the statute's enactment are subject to the statute's notification provisions only if, based on an "individualized clinical assessment," they are found to pose a "high risk" of recidivism. *Roe*, 125 F.3d at 54. For offenders convicted after the statute's enactment, the court pointed out, disclosure is limited to specified members of the community, including the victim and his family, the police, the offender's immediate family, other occupants of the offender's residence, and treatment providers, unless the individual offender is determined to be "high risk." *Id.* at 50. Similarly, the Third Circuit upheld the New Jersey statute after finding that New Jersey classifies offenders by risk category, provides no public disclosure for those who pose the least risk (45 percent of offenders) and widespread disclosure only for those who pose the greatest risk (5 percent of offenders). *E.B.*, 119 F.3d at 1098.

In contrast, as we have noted, the Kansas Supreme Court considered a sex offender registration and notification statute that, like the Alaska statute, allowed unrestricted access to the registration information regardless of risk. *Kansas v. Myers*, 260 Kan. 669, 923 P.2d 1024, 1041 (1996). It concluded that the statute had a punitive effect, and therefore was an unconstitutional ex post facto law, because it was "excessive and beyond that necessary to promote public safety." *Id.* at 1043. Surveying other states' statutes, the Kansas Supreme Court concluded that almost every other state limited access by means such as: 1) basing the type of community notification on the specific risk level assigned to the individual offender (New Jersey, New York); 2) only releasing information to those

living in close proximity to the offender (Louisiana); and 3) providing information only to those inquiring about a specific person (Iowa, North Carolina). *Id.* at 1029, 1038. It based its holding that Kansas's broad notification provisions violated the Ex Post Facto Clause on its conclusion that "of the sex offender registration laws that have successfully overcome ex post facto challenges, none have (sic) provided for unlimited public access to the registered sex offender information." *Id.* at 1036.

Like the statute at issue in *Myers*, Alaska's statute is exceedingly broad. The unlimited breadth of the Alaska statute weighs strongly in favor of a determination that its effect is punitive. Indeed, the punitive effect caused by the excessiveness of the statute's provisions in relation to its non-punitive purpose is exemplified by John Doe I's case. Convicted of sexual abuse of his minor daughter, Doe I was successfully rehabilitated. After his release from prison, a state court determined that he was not a pedophile, and that he posed a very low risk of reoffending. On that basis, the court returned his minor daughter to his custody. Nevertheless, under the Alaska statute's registration provisions, Doe I would be forced to submit to in-person registration at his local police department four times a year, every year, and, under its notification provisions, he would be compelled forever to suffer the unremitting social obloquy and ostracism that would accompany his being publicly labeled a sex offender on Alaska's world-wide internet website. Presumably, in any state that does not provide for unlimited public disclosure of sex offender information in all cases in which a defendant has ever been convicted of a sex offense, the record of John Doe I's past incest conviction would not be

disseminated by state officials to the world at large for the rest of his life.

8. *Summary*

In sum, the *Mendoza-Martinez* test leads us to hold that the Act's effect is sufficiently punitive that notwithstanding the legislature's ambiguous intent, the Alaska statute should be classified as punitive for Ex Post Facto Clause purposes. Four of the seven actors favor this result.[15] Two factors, particularly, demonstrate that the effect of this particular statute is to increase the penalty the law provided at the time Doe I and Doe II's offenses were committed. First, there is the substantial disability imposed by the Act. The registration provisions, which require in-person registration at a local police station where registrants must provide detailed information four times each year for life in the case of some defendants, and annually for 15 years in the case of others, are extremely burdensome. This disability is exacerbated by the public notification provisions that plaintiffs' uncontradicted evidence demonstrates exposes all registrants to world-wide obloquy and ostracism. Second, unlike the sex offender registration and notification statutes upheld by the Second, Third and Sixth Circuits, as well as by this Circuit in *Russell*, the Alaska statute is excessive in relation to its non-criminal purpose. An offender cannot

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[15] We note that our conclusion is not based on a simple equation in which each factor is given equal weight. Rather, we consider the importance of each factor in relation to the legislative scheme we are examining.

escape the Act's grasp no matter how demonstrable it may be that he poses no future risk to anyone, and no matter how final the judicial determination that he has been successfully rehabilitated; in short, under the Alaska statute, the requirements relating to disclosure of a past offense are not related to the risk posed. Furthermore, that the Act applies only to offenders who have been convicted of committing a crime, that its requirements are incorporated in the criminal judgment imposed, and that it otherwise serves retributive ends, provides additional support for our conclusion that the Alaska statute is punitive.

Three factors suggest that the Act is not punitive. The first is the fact that sex offender registration and notification provisions have not historically been regarded as punishment. However, the fact that the Alaska statute is so much more sweeping in its scope than comparable statutes in other states leads us to limit the weight we place on this *Mendoza-Martinez* factor. The second is that it is not imposed only upon a finding of scienter. The relevance of this factor is to assist in the determination of whether the conduct giving rise to the sanction is the sort that traditionally subjects someone to punishment, because in general, *mens rea* is an element of a crime. In this case, however, given that the conduct that does not require a finding of scienter, conviction of offenses such as sexual abuse of a child under 13 years of age, is serious criminal activity, we do not believe that this factor lends much support for the conclusion that the Act is not punitive. The final factor is the fact that the Act has a non-punitive purpose: protecting public safety. Here, we

conclude that the additional purpose, while of unquestioned importance, does not serve to render a statute that is so broad and sweeping non-punitive.

No one *Mendoza-Martinez* factor is determinative, and excessiveness, standing alone, would not be dispositive under the *Mendoza-Martinez* test. *Hudson v. United States*, 522 U.S. 93, 101, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997). Still, we place substantial weight on the fact that the Act is far more sweeping than necessary to serve its alternate purpose, promoting public safety. This is so not only with respect to the undifferentiated scope of the Act but also with respect to the severity of the disabilities it imposes. When we weigh all the *Mendoza-Martinez* factors together, we conclude, on balance, that for purposes of the Ex Post Facto Clause, the effect of the Alaska statute is punitive.[16]

Because the Alaska Sex Offender Registration Act increases the punishment for sex offenses, the Ex Post Facto Clause limits its application to those sex offenders whose crimes were committed after its enactment. *California Dep't of Corr. v. Morales*, 514 U.S. 499, 504-05, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995). Doe I was convicted in 1985, and Doe II was convicted in 1984. The Alaska legislature enacted the Act in 1994. Therefore, the Alaska statute's application to the appellants violates the Ex Post Facto Clause.

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[16] We recognize that applying a multi-factor test is frequently not an entirely satisfactory method of resolving legal issues. Sometimes, however, it is the best approach available to courts. In any event, it is the approach that the Supreme Court has held should be applied here. *See Russell*, 124 F.3d at 1086-87.

III. APPELLANTS' OTHER CLAIMS

In addition to their Ex Post Facto Clause argument, plaintiffs claim that the statute violates their procedural and substantive Due Process Clause rights, as well as their federal constitutional privacy rights. Because we conclude that the Ex Post Facto Clause bars the application of the statute to Doe I or Doe II, we need not consider these arguments.[17] Our failure to address them should not be taken, however, as an indication that we do not believe that they have merit.[18]

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[17] In the complaint, Jane Doe I claims only that her privacy right, and not her Ex Post Facto Clause right, has been violated. Because we conclude that Jane Doe I's husband, John Doe I, is not subject to the Alaska statute, Jane Doe I will receive all of the relief that she seeks in her complaint, and therefore we need not decide whether the Act violates her privacy right.

[18] The state officials argue that our opinion in *Russell* forecloses the appellants' claims, because in that case we held that the Washington sex offender registration and notification statute does not implicate registrants' federal privacy rights. *See Russell*, 124 F.3d at 1093-94. However, in *Russell*, we made clear that the plaintiffs "fail to explain precisely how the Act violates [their privacy rights] beyond collating and releasing information." *Id.* at 1093. We then rejected their privacy argument after explaining that the mere "collection and dissemination of information" does not violate a privacy interest or amount to a deprivation of liberty. *Id.* at 1094. In this case, plaintiffs allege more that [sic] the mere collection and release of information – they assert that the state requires them to appear four times each year at local police stations to answer a host of questions, and labels them "sex offenders" on its internet website, which is accessible world-wide. Furthermore, in contrast to the Washington statute, Alaska's brands plaintiffs sex offenders without any attempt to classify them by risk posed, or to provide them with an opportunity to prove that

IV. CONCLUSION

We conclude that the Alaska Sex Offender Registration Act violates the Ex Post Facto Clause. We therefore REVERSE the district court's orders granting summary judgment for the state officials, and REMAND for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

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they have been rehabilitated. While we do not decide whether the Alaska statute infringes on the appellants' due process rights, we doubt that *Russell* fairly could be read to stand for the exceedingly broad proposition urged by the state.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

JOHN DOE I, et al., Plaintiffs, vs. RONALD L. OTTE, Commissioner, et al., Defendants.	)	No. A94-0206-CV (HRH)

ORDER

(Filed Mar. 31, 1999)

Cross-Motions for Summary Judgment

Defendants move for partial summary judgment.[1] This motion is opposed. Plaintiffs' cross-move for summary judgment.[2] This motion is also opposed. Oral argument has not been requested.

FACTS

Plaintiffs are two convicted sex offenders, John Doe I and John Doe II, and Jane Doe, wife of John Doe I. They are challenging Alaska's Sex Offender Registration Act ("ASORA"), AS 12.63.010 to -.100 (1994) and AS 18.65.087

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[1] Clerk's Docket No. 95.

[2] Clerk's Docket No. 107.

(1994),[3] on both federal and state constitutional grounds. Defendants are Ronald L. Otte, Commissioner of the Department of Public Safety for the state of Alaska and Bruce M. Botelho, Attorney General for the state of Alaska. They are named in both their official and individual capacities.

Prior to the enactment of ASORA in 1993, hearings were held before the Alaska Legislature. Testimony before the legislature showed that there is a high level of sexual abuse in Alaska, a large and growing number of sexual offenders in Alaska, and a high level of recidivism in sex offenders.

With respect to the high level of sexual abuse in Alaska, the testimony showed that Alaska had the highest child sexual abuse rate in the nation; the rate was said to be approximately six times the national average.[4] Moreover, the sexual assault rate was reported to be the

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[3] In 1998 and 1999, changes were made by the Alaska Legislature to the registration and notification provisions of ASORA. The plaintiffs moved for leave to file a supplemental brief addressing the changes made. Clerk's Docket No. 115. The court's analysis of ASORA on the parties' cross-motions for summary judgment addresses the substance of ASORA which was not affected by the recent changes. The motion for leave to file supplemental brief is denied.

[4] Hearing on HB 69 before the House State Affairs Committee, 18th Alaska Legislature, 1st Session (Feb. 2, 1993). Hearing on CSHB 69 before the Senate Finance Committee, 18th Alaska Legislature, 1st Session (Apr. 28, 1993).

second highest in the nation.[5] Finally, the incidence of rape had increased 91% in the previous two years.[6]

Testimony also indicated that there are a large number of sexual offenders in Alaska. In 1993, for instance, approximately one-fourth of Alaska's prison inmates were incarcerated for sexual offenses.[7] In 1993, 100 sex offenders were scheduled to be released, whereas prior to 1993, only 50 sex offenders were released annually.[8] Finally, studies presented to the legislature evidenced an extremely high recidivism rate for sex offenders.[9]

The Alaska Legislature made the following legislative findings:

> (1) sex offenders pose a high risk of reoffending after release from custody;
>
> (2) protecting the public from sex offenders is a primary governmental interest;

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[5] *Id.*

[6] Hearing on CSHB 69 before the Senate Finance Committee, 18th Alaska Legislature, 1st Session (Apr. 28, 1993) (testimony of Cindy Smith, Executive Director, Network on Domestic Violence and Sexual Assault.

[7] Hearing on HB 69 before the House Finance Committee, 18th Alaska Legislature, 1st Session (Mar. 3, 1993) (testimony of C.E. Swackhammer, Deputy Commissioner, Dept. of Public Safety).

[8] Hearing on HB 69 before the House Finance Committee, 18th Alaska Legislature, 1st Session (Feb. 10, 1993) (testimony of Cindy Smith).

[9] Hearing on HB 69 before the House Finance Committee, 18th Alaska Legislature, 1st Session (Feb. 10, 1993).

(3) the privacy interests of persons convicted of sex offenses are less important than the government's interest in public safety; and

(4) release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety.

§ 1, Ch. 41, SLA 1994.

Based upon this legislative fact-finding, the Alaska Legislature enacted ASORA which included both registration and notification provisions for sex offenders. "Sex offender" is defined as a person convicted of a sex offense[10] in any jurisdiction, regardless of whether the conviction occurred before, after, or on August 10, 1994 (the effective date of ASORA). To fulfill the registration requirements, a sex offender must register in person at the Alaska state trooper post or municipal police department located nearest to where the sex offender resides at the time of registration and (1) complete a registration form which includes, at a minimum, the sex offender's name, address, place of employment, date of birth, each conviction for a sex offense for which there is a duty to register, all aliases used, and driver's license number; (2) be fingerprinted, and (3) be photographed. AS 12.63.010(b)(1)-(2) (1994).

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[10] Sex offense is defined in AS 12.63.100(3) (1994) as a crime, or an attempt to commit a crime, under AS 11.41.410 to 11.41.438, AS 11.41.450, AS 11.41.455, AS 11.61.125, AS 11.66.110, former AS 11.15.120 or AS 11.15.134, or former AS 11.40.110 or AS 11.40.200, or a similar law in another jurisdiction.

The registration requirements end 15 years after an offender's unconditional discharge if the offender has only one prior sex offense, but continue for the offender's lifetime if the offender has been convicted of two or more sex offenses. AS 12.63.020(a) (1994).

The notification provisions provide that the public can have access to the offender's name, date of birth, address, photograph, place of employment, and public information about the conviction (date, place, court of conviction, and length of sentence). AS 18.65.087(b) (1994) The Department of Public Safety is charged with maintaining a central registry of sex offenders. AS 18.65.087(a) (1994).

Up until June of 1997, anyone could purchase a complete list of the state's registered sex offenders or have a specific search conducted for $10.[11] In addition, a person could look at the list for free at Alaska state trooper offices. "In an ongoing effort to make Alaska communities safer and give the public easy access to information about people convicted or rape of child molestation," the Department of Public Safety made the Alaska Sex Offender Registry database available worldwide via the Internet at http://www.dps.state.ak.us/sorcr/ in June of 1997.[12] At the same time, the state waived any charges or fees for requests of paper copies of the list of sex offenders to make the "information available to as many

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[11] Clerk's Docket No. 107, Exhibit 4.

[12] Clerk's Docket No. 197, Exhibit 5 at 1.

citizens as possible."[13] The opening display of the registered sex offender Internet site contains the following warning: "This information is made available for the purpose of protecting the public. Anyone who uses this information to commit a criminal act against another person is subject to criminal prosecution."[14]

The plaintiffs first brought this suit in 1994. They moved for a preliminary injunction seeking to enjoin the enforcement of ASORA. The motion was denied in part and granted in part. The court found that John Doe I and Doe II were required to register under ASORA; however, it enjoined the state from releasing their registration information as part of the notification procedures. *Rowe v. Burton*, 884 F. Supp. 1372 (D. Alaska 1994).[15]

Plaintiffs John Doe I and John Doe II assert that their civil rights afforded by the United State' [sic] Constitution have been violated because ASORA constitutes: (1) a law by the state of Alaska that modifies existing or prior contracts in violation of Article I, Section 10; (2) denial of due process and a violation of the Equal Protection Clause guaranteed by the Fourteenth Amendment; (3) an

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[13] *Id.*

[14] http://www.dps.state.ak.us/sorcr/.

[15] The plaintiffs filed their complaint pseudonymously to prevent disclosure of their identities, and the court ordered them to file an amended complaint using their true names. Clerk's Docket No. 62. When the plaintiffs refused to comply, the court dismissed the case, appealed, and the Ninth Circuit Court of Appeals reversed the dismissal for failure to file in the plaintiffs' true names and remanded for reinstatement of the complaint and the preliminary injunction and for further proceedings.

ex post facto law prohibited by Article I, Section 10; (4) an unreasonable search or seizure prohibited by the Fourth Amendment; and (5) an invasion of the plaintiffs' right to privacy. In addition, Jane Doe asserts her own claim that ASORA violates her right to privacy.

In addition, plaintiffs assert numerous pendant state law claims contending that ASORA violates the Alaska Constitution because it constitutes: (1) an invasion of privacy under Article I, Section 22; (2) a denial of due process inconsistent with Article I, Section 7; (3) an *ex post facto* law prohibited by Article I, Section 15; (4) a violation of the Equal Protection Clause guaranteed by Article I, Section 12.

The court shall grant summary judgment under Federal Rule of Civil Procedure 56(c) only if "there is no genuine issue as to any material fact and [ ] the moving party is entitled to judgment as a matter of law." Summary judgment is required if the non-moving party fails to make a showing sufficient to establish the existence of an essential element and upon which the non-moving party bears the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

DISCUSSION

Defendants assert that they are entitled to summary judgment on plaintiffs' claim that ASORA: (1) is an *ex post facto* law,[16] (2) violates their plea bargain contracts; and

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[16] Defendants also asset that they are entitled to summary judgment on a claim that ASORA violates the Double Jeopardy

(3) violates their right to privacy. Plaintiffs cross-move for summary judgment on all of their claims.

A.

Ex Post Facto Claim

Plaintiffs claim ASORA is an *ex post facto* law. Article I, Section 10, of the United States Constitution provides that no state shall pass any *ex post facto* law. As *ex post facto* law is one "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then described." *Weaver v. Graham*, 450 U.S. 24, 28 (1981) (*quoting Cummings v. Mission*, 4 Wall. 277, 324-26 (1867)). Therefore, the question is whether the registration and/or the notification provisions of ASORA constitute punishment. The parties cross-move for summary judgment on this issue.

Defendants assert that *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997), *cert. denied* ___ U.S. ___, 118 S. Ct. 1191 (1998), is dispositive. In *Russell*, the Ninth Circuit held that the registration and notification provisions of the Washington registered sex offender law did not violate the *ex post facto* clause. Plaintiffs seek to distinguish *Russell* on grounds that the registration and notification

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clause of the Fifth Amendment of the United States Constitution. However, as the plaintiffs' point out, the Does are not challenging ASORA based upon the claim that it violates the double jeopardy clause. The State's motion for summary judgment on the issue that ASORA does not violate the Double Jeopardy clause is denied because that issue is not before the court.

provisions present in ASORA differ significantly from the Washington law analyzed in *Russell*. They assert that even under *Russell*, the ASORA registration and notification provisions constitute punishment and violate the *ex post facto* clause, thereby entitling them to summary judgment as a matter of law.

The court must employ the "intent-effects" test to determine whether ASORA imposes punishment in violation of the *ex post facto* clause. *Russell* 124 F.3d at 1087. This test requires that the court first inquire whether the legislature intended the sanction to be punitive. The "intent" prong deals solely with the declared purpose of the legislature as well as the construction and design of the statute. *Id.* Second, the court must consider whether the sanction is so punitive in effect as to prevent the court from viewing it as regulatory or civil in nature, despite the legislature's intent. *Id.* As to the "effects" prong, a challenging party is required to demonstrate by "the clearest proof" that the statutory scheme is so punitive in effect as to negate the State's non-punitive intent. *Id.*

In *Russell* and *Rowe v. Burton*, the courts considered separately the constitutionality of the registration provisions apart from the constitutionality of the notification provisions. Thus, the court turns first to the registration provisions.

1. Registration Provisions

a. Intent

The court first applies the "intent-effects" test to the registration provisions of ASORA. The court must decide

whether the Alaska legislature intended the registration provisions as punitive.

Russell provides this court with guidance as to what to consider in determining the legislature's intent. The court must look to the language of the statute and the overall design of the registration provisions. In *Russell*, the court first looked to the legislative findings as evidencing an unequivocal regulatory motivation. The Washington findings declare:

> "The legislature finds . . . law enforcement's efforts to protect their communities, conduct investigations, and quickly apprehend offenders who commit sex offenses, are impaired by the lack of information available to law enforcement agencies about convicted sex offenders who live within the law enforcement agency's jurisdiction."

Russell, 124 F.3d at 1087 (*quoting* 1990 Wash. Laws, ch. 3, § 401). Defendants submit that *Russell* is dispositive on the issue that the Alaska legislature did not intend the registration provisions as punitive. According to the defendants, the findings of the Alaska legislature are so similar to those in [sic] presented in Washington, that *Russell* mandates that this court find no punitive intent. Both states' findings focus on the protection of the public. However, as the plaintiffs point out, the findings put forth by the Alaska legislature are much less specific pertaining to the need for registration than are the Washington findings. For example, the Alaska findings simply provide that protection of the public from sex offenders is a primary governmental focus. They seem to be geared more for the notification provisions of ASORA than the

registration provisions now under discussion. Yet, this distinction alone does not evidence a punitive intent.

The next step the court must undertake to determine the legislature's intent is to look to the overall design of the registration provisions. In *Russell*, the Ninth Circuit found that the overall design of the Washington provisions evidenced a regulatory, not a punitive, intent. Crucial to the court's decision was the following. First, the registration provisions did no more than apprise law enforcement officials of certain basic information about an offender living in the area. Second, the registration provisions did not place any restraint on the offenders' movements because they were free to move so long as they notified law enforcement, and they could comply with the registration requirements by simply mailing a written notice to the sheriff. Finally, the court placed importance upon the fact that the information required was not burdensome. *Russell*, 124 F.3d at 1087.

Defendants again argue that *Russell* controls and that the design of ASORA indicates a regulatory intent because there is no evidence of a penal intent. However, *Russell* may be distinguishable on several grounds. First, ASORA's registration provisions do require one to register in person; thereby restraining an offender's movement. Second, the information required as part of registration is slightly more burdensome in that the offender must submit to a photograph and be fingerprinted. While these are distinguishing features, they are not of sufficient weight to require a different result from *Russell* for the following reasons. First, in *Doe v. Pataki*, the Second Circuit, in considering New York's sex offender registration statute, found that the requirement

that a person register in person every 90 days (significantly more onerous than the requirement in Alaska which requires initial registration and registration upon moving) was cumbersome, but not "sufficiently severe to transform an otherwise non-punitive measure into a punitive one." *Doe v. Pataki*, 120 F.3d 1263, 1285 (2d Cir. 1997). Second, the additional requirements of being photographed and fingerprinted are not overly burdensome in light of the considerable benefits to law enforcement deriving from having a photograph and fingerprints to aid in finding an individual if suspected of a future crime.

The plaintiffs then offer six additional arguments in support of their proposition that ASORA registration requirements evidence an objective intent to establish a criminal, not a regulatory, statutory scheme. They point to: (1) the placement of the registration provisions of ASORA (AS 12.63.010) in the state's code of criminal procedure; (2) the focus of the statute; (3) the fact that registration constitutes a new form of post-incarceration supervision; (4) the fact that there is no escape from ASORA's application; (5) the legislature's amending the criminal law by making the registration requirements part of any plea agreement and part of any sentence imposed by the sentencing court; and (6) the imposition of a duty on the offender solely as a result of a past conviction.

According to the plaintiffs, placement of the registration provisions in the state's code of criminal procedure evidences an intent to establish a criminal statutory scheme. Although this court concluded in *Rowe* that codification of ASORA in the criminal code was not evidence

of punitive intent, plaintiffs contend that the United States Supreme Court's decision in *Kansas v. Hendricks*, 521 U.S. 346 (1997), requires this court to hold otherwise. In *Hendricks*, the Supreme Court felt that "Kansas' objective to create a civil proceeding is evidenced by its placement of the Sexually Violent Predator Act within the Kansas probate code, instead of the criminal code." *Hendricks*, 521 U.S. at 361. It follows then, according to the plaintiffs, that placement of the registration provisions of ASORA in the code of criminal procedure establishes a punitive intent.

Defendants rebut this argument on three grounds. First, they submit that while codification of a statute in a particular title is evidence of a legislative intent, it is not conclusive. In support, they refer the court to *Pataki* 120 F.3d at 1278, where the fact that the New York sex offender registration law was codified in "corrections law" was of little relevance to the determination of legislative intent. Second, defendants note that AS 12 is not limited only to matters directly related to the prosecution and punishment of criminal offenses. For example, the code of criminal procedure contains laws relating to medical examiners and actions for post-conviction relief which are civil actions.[17]

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[17] Defendants argue that the legislature's codification of a particular statute should not be dispositive of the legislature's intent because the revisor of statutes, not an elected official, has the power to renumber and rearrange the legislature's own codification. However, this argument is weak because the fact remains that the legislature itself intended to place the registration provisions within the code of criminal procedure.

Washington designated its registration provisions as Wash. Rev. Code § 9A.44.130-.140, a part of the Washington Criminal Code. The court in *Russell* did not address this issue, nor did it appear concerned about it. This court adheres to its earlier decision that the Alaska Legislature's placement of the registration provisions in the code of criminal procedure is a practical, logical place to locate the registration requirement.

Second, plaintiffs contend that the focus of the registration provisions evidence an intent to establish a criminal statute because ASORA is aimed at sex offenders and not at an activity from which the offender should be barred because of relevant past conduct. They cite *Fleming v. Nestor*, 363 U.S. 603 (1960), for the proposition that if the law is aimed at individuals, rather than an activity from which the individuals should be barred, the law is punitive, not regulatory. *Id.* at 613-14.

However, as the defendants point out, the Supreme Court noted in *Nestor* that no single, clear basis for determining whether a statute is regulatory or punitive can be derived from the cases leading up to *Nestor* since each case turns on "its own highly particularized context." *Id.* at 616. Moreover, the Supreme Court has upheld laws aimed at individuals rather than at an activity from which the individual should be barred. The Supreme Court did so in *Nestor* where it upheld a statute that terminated social security benefits for persons deported for previous participation in communist activities. *Id.* at 612.21. *See also DeVeau v. Braisted*, 363 U.S. 144 (1960) (upholding a statute that prohibited felons from working for waterfront unions).

The court finds that while the registration provisions are aimed at sex offenders rather than an activity, such is at best slight evidence of a legislative punitive intent.

Third, plaintiffs assert that the registration provisions of ASORA are a criminal statutory scheme, that ASORA is nothing more than a new form of post-incarceration supervision because it requires periodic reporting, notice of change of employer, and notice of change of residence, all of which are conditions imposed on post-incarceration in Alaska. Moreover, ASORA is administered by a criminal justice agency – the state troopers. Defendants do not directly rebut this argument, probably because the registration requirements can be construed as a form of post-incarceration supervision. The Ninth Circuit in *Russell* did not address this issue. This court finds that the registration requirement is supervisory and is some evidence of a punitive intent.

Fourth, plaintiffs argue that the fact that there is no escape from ASORA's application reflects the legislature's intent to enact a criminal statutory scheme. However, as the defendants submit, registration statutes have long been recognized as regulatory, not punitive measures. They refer the court to numerous cases where the Supreme Court has upheld the use of registration statutes. Finally, the defendants remind the court that it previously noticed that "[r]egistration is not a concept which this court perceives to be imbued by history with a punitive connotation." *Rowe v. Burton*, 884 F. Supp. 1372, 1378 (D. Alaska 1994). ASORA is essentially regulatory. Registration *per se* is not punitive. Although neither party points it out, it is possible to escape ASORA's application, although not initially. The registration provisions do end

after 15 years if a person have been convicted of only one offense. AS 12.63.020(a).

Fifth, plaintiffs submit that the fact that the legislature simultaneously amended the criminal law to make registration provisions part of any plea agreement and part of any sentence imposed by the sentencing court evidences a penal intent. This argument puts the cart before the horse. The legislature enacted the registration provisions in response to their findings that registration would make it easier for law enforcement. Notifying those persons who are newly convicted of sex offense crimes that they will be subject to these registration provisions as a result of their conviction is the appropriate and fair thing to do. It does not establish that the legislature intended the registration provisions to be punitive.

Sixth, plaintiffs submit that the imposition of a duty (the duty to report to the authorities, the duty to provide one's fingerprints, the duty to be photographed, and the duty to provide information) on the offender, which is imposed solely as a result of a past conviction, is clear evidence of an intent to establish a criminal statutory scheme because laws which compel the doing of an act, after the fact, violate the prohibition of the *ex post facto* clause. *Calder v. Bull*, 3 U.S. (3 Dall) 386, 388 (1798).

The plaintiffs misstate the scope of the *ex post facto* clause. The focus is upon laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts." *Collins v. Youngblood*, 497 U.S. 37, 43 (1990). ASORA does not define a crime. Whether or not ASORA imposes punishment retroactively begs the question

under analysis. For purposes of evaluating the legislature's intent, the duty to register is not inherently punitive. It is not evidence of punishment because ASORA is just another regulatory disability – like the loss of the right to vote or deportation – which results from a prior conviction. The fact that a conviction gives rise to the duty to register does not bespeak a punitive intent. Rather, imposing the duty of registration merely addresses the legislative findings that offenders pose a high risk of re-offending after release from custody.

In summary, the court finds no evidence of penal intent in the Legislative findings, in the Alaska Legislature's placement of the registration provisions in the code of criminal procedure, in notifying those persons who are newly convicted of sex offense crimes of the applicability of the registration provisions, or in imposing a regulatory disability upon sex offenders to register. However, the focus of ASORA on sex offenders and not at an activity from which the offender should be barred because of relevant past conduct is slight evidence of punitive intent and the registration requirements are in fact a form of post-incarceration supervision.

Weighing all of the foregoing, the court concludes that the legislature did not act with punitive intent in enacting the registration provisions of ASORA.

b. Effect Prong

The court next considers the second part of the "intent-effects" test. Plaintiffs must show by the "clearest proof" that the registration requirement is "so punitive" in effect that it overcomes the non-punitive legislative

intent. If they do so, the law must be considered an *ex post facto* law in violation of the Constitution. In determining whether the plaintiffs have met their burden, the court must consider the *Mendoza-Martinez* factors as set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). The court may consider whether:

> [1] the sanction involves an affirmative disability or restraint, [2] it has historically been regarded as a punishment, [3] it comes into play only on a finding of *scienter*, [4] its operation will promote the traditional aims of punishment-retribution and deterrence, [5] the behavior to which it applies is already a crime, [6] an alternative purpose to which it may rationally be connected is assignable for it, and [7] it appears excessive in relation to the alternative purpose assigned. . . .

Id. (footnotes omitted). The Supremé Court recently emphasized that no one factor should be considered dispositive. *Hudson v. United States*, ___ U.S. ___, 118 S. Ct. 488, 494 (1997).

The first *Mendoza-Martinez* factor is whether the registration provisions involve an affirmative disability or restraint. The plaintiffs assert that ASORA amounts to an affirmative disability and restraint because requiring them to register deprives them of rights "to which they would otherwise have been entitled, and the deprivation of those rights is caused solely by the past criminal conviction."[18] The Ninth Circuit in *Russell* concluded

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[18] Clerk's Docket No. 107 at 61.

without analysis that the Washington registration provisions did not impose an affirmative restraint or disability. *Russell*, 124 F.3d at 1089. This court has previously held that registration:

> does not affirmatively limit plaintiffs. It does not disqualify the registrant from any activity, personal or professional.

Rowe, 884 F. Supp. at 1378. Finally, as defendants point out, the registration provisions are not significantly more of an affirmative restraint than the provisions for securing an Alaska driver's license. The court concludes that the registration provisions do not impose an affirmative disability or restraint. This factor weighs in favor of a finding of no punitive effect.

The second *Mendoza-Martinez* factor considers whether registration has historically been regarded as punishment. Plaintiffs contend that it has. However, this argument was directly addressed and dismissed in *Russell* when the court stated that registration provisions are "typically and historically a regulatory measure." *Russell*, 124 F.3d at 1089. Furthermore, that court went on to cite numerous cases where registration provisions have overwhelmingly been sustained as constitutional. In sum, this factor weighs in favor of a conclusion of no punitive effect.

The third *Mendoza-Martinez* factor asks the court to weigh if registration only comes into play on a finding of *scienter*. The plaintiffs contend that since the registration provisions apply only to those convicted of a crime, ASORA turns on a finding of *scienter*.

In rebuttal, defendants submit that registration is not based on a finding of *scienter,* but on a legislative finding that sex offenders have a "high risk of reoffending" and the conviction is simply the evidentiary basis for that finding. § 1, Ch. 41, SLA 1994. The requirement to register is based not only upon the *scienter* of the underlying crime but also upon the established high rate of recidivism by sex offenders. Therefore, the court concludes that ASORA's registration provisions do not have a punitive effect because they are not based alone upon a finding of *scienter.*

In analyzing the fourth *Mendoza-Martinez* factor, the court must consider whether the registration provisions promote the traditional aims of punishment-retribution and deterrence. Plaintiffs assert that the registration provisions punish and deter crime.

However, as the defendants argue, the fact that registration has a deterrent effect (which the defendants concede the registration requirements may have) does not automatically render an otherwise regulatory sanction as punitive. *Kansas v. Hendricks,* 521 U.S. 346, 361. This is true because deterrence can serve both civil and criminal goals. Moreover, for a state action to be deemed retributive, it must amount to a deliberate imposition by the state of some measure intended to chastise, deter, or discipline. *Doe v. Kelley,* 961 F. Supp. 1105, 1111 (W.D. Mich. 1997). Plaintiffs have put forth no evidence of a deliberate intent to discipline.

The existence of some deterrent effect does not make the registration provisions punitive in nature. Deterrence alone, particularly absent a showing of retribution, is

insufficient without more to render the provisions as punitive.

The fifth *Mendoza-Martinez* factor considers whether the behavior to which the sanction applies is already a crime. Plaintiffs assert that since the registration provisions apply only to those persons who have been convicted of a criminal offense, it is conclusively established that the behavior to which ASORA applies is already a crime. However, the crime of failing to register under ASORA constitutes a separate offense and "[I]t is hornbook law that no *ex post facto* problem occurs when the legislature creates a new offense that includes a prior conviction as an element of the offense, as long as the other relevant conduct [failing to register under ASORA] took place after the law was passed." *Russell,* 124 F.3d at 1088-89. Therefore, the court finds no evidence of a punitive effect after considering this factor.

The sixth *Mendoza-Martinez* factor looks at the alternative purposes to which the registration provisions may rationally be connected. Plaintiffs admit that there is an alternative purpose to the registration provisions – namely, the protection of the public from sex offenders. The plaintiffs disingenuously dispute the validity of this purpose. The evidence before the legislature and its findings strongly support the need for the protection of the public. Therefore, this factor supports a conclusion that the registration provisions do not have a punitive effect.

The seventh and final *Mendoza-Martinez* factor analyzes whether the registration provisions appear excessive in relation to the alternative purpose.

Plaintiffs argue that the registration provisions are excessive in relation to the purpose because there is no means of being relieved of the registration requirement. The plaintiffs exaggerate. A person who has only one conviction can be relieved from the registration requirements after 15 years. While 15 years is a long time, it is a sufficient amount of time in which to require a person to register and to ensure that the person is unlikely to re-offend. This finding is consistent with *Russell* where the Ninth Circuit held that requiring less serious offenders to register for 10 or 15 years was not excessive given the state interest at stake. *Russell,* 124 F.3d at 1089. Therefore, the court concludes that this factor weighs in favor of finding no punitive effect.

In summary, the court has determined that: (1) the registration provisions do not impose an affirmative disability or restraint upon the plaintiffs; (2) the registration provisions have not traditionally been considered to be punishment; (3) the registration provisions are not based only upon a finding of *scienter;* (4) the deterrence factor in the registration provisions, absent a showing or retribution, was insufficient to render the registration provisions punitive; (5) the behavior to which the sanction (failure to register) applies is a separate offense from the underlying crime; (6) the evidence before the legislature and its findings strongly support the need for the protection of the public; and (7) the registration provisions are not excessive in relation to the purpose given the state interest (protection of the public from the risk of re-offending sex offenders). Based on the foregoing, the court concludes that the plaintiffs have not shown by the clearest proof that the registration provisions are so punitive as to

negate the legislature's non-punitive intent. Therefore, the registration provisions do not constitute punishment violative of the *ex post facto* clause. Defendants' motion for summary judgment on plaintiffs' *ex post facto* claim as it pertains to the registration requirements is granted. Plaintiffs' cross-motion for summary judgment is denied.

2. Notification Provisions

a. Intent

The court must consider whether the legislature intended the notification provisions to be punitive by looking to the declared purpose of the legislature as well as the construction and design of the notification provisions. The legislative findings make plain that the "release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety." § 1, Ch. 41 SLA 1994. This suggests a regulatory, not a punitive purpose.

Plaintiffs urge three reasons why the construction and design of the notification provisions should be held to evince punitive intent on the part of the Alaska Legislature. First, plaintiffs contend that the notification provisions are located in the Alaska criminal code; thereby evidencing a punitive intent. Plaintiffs are wrong. The notification provisions of ASORA, AS 18.65.087, are codified in the Health, Safety, and Housing Code. Therefore, it cannot be said that the placement of the notification provisions within the code establishes a punitive intent.

Second, plaintiffs assert that since the legislature amended the criminal law by making the public notification requirements part of any plea agreement and part of

any sentence imposed by the sentencing court, it evidences the legislature's intent to enact a punitive law. However, as is more fully discussed *supra* under the registration provisions, notifying persons who are convicted of sex offense crimes that they will be subject to public notification as a result of their conviction is the appropriate and fair thing to do.

Third, plaintiffs submit that an objective intent to establish a criminal statutory scheme is established because ASORA has insufficient limitations on public notification. Without specific limitations on how, when, and what information is released to the public, the release of all information on all offenders evidences an intent to impose punishment.

This argument requires some scrutiny. In *Russell*, the Ninth Circuit found that Washington's law which had stringent restrictions[19] on the release of registration information was not punitive because "[a] law designed to punish an offender would not contain strict limitations on notification." 124 F.2d at 1091. As the plaintiffs point out, ASORA contains no limitations on notification. Rather than limit notification to a specific geographic area like Washington does, under ASORA, the information has been published on the "modern day soap-box"[20] for the

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[19] Under Washington law, notification occurs only when the release of information is necessary for public protection. The notification occurs two weeks in advance of an offender's release from prison to allow time for the community to prepare for the release. ASORA does not have these protections.

[20] The United States Supreme Court recently compared the Internet to the 18th century soap-box. The court held that the

entire world to view. Second, under the Washington law public notification is not automatic like it is in Alaska. In Washington, an individual determination is made to ascertain whether a sex offender poses a threat to the community. In Alaska, all sex offenders are subject to public notification regardless of their proclivity for re-offending and their level of threat to the community.

Defendants rebut this argument in two ways. First, they assert that plaintiffs ignore the fundamental difference between the notification provisions of the Washington statute and ASORA – namely, that Washington provides for an affirmative notification, whereas ASORA allows passive disclosure. The impact of a government agent going door-to-door to inform residents that a sex offender is in their midst is very different and more intrusive than making public information available to those who want it. The passive disclosure required by ASORA is no more suggestive (and could be viewed as less suggestive) of a punitive intent than Washington law which imposes disclosure upon all in a given area irrespective of whether they need or care to move. Under the notification provisions of ASORA, only those who know that they can access such information and care to do so are aware of sex offenders in their midst.

Second, defendants submit that the plaintiffs have failed to establish that the extra-Alaska dissemination via the Internet contradicts the legislature's regulatory intent. However, ASORA does seem to cast a much wider net

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Internet allows a person to become a "town crier with a voice that resonates farther than it could from any soapbox." *Reno v. ACLU*, ___ U.S. ___, 117 S. Ct. 2329, 2344 (1977).

than is absolutely necessary. The fact that a statute is over-broad in some respects does not, without more, derogate from its non-punitive goals:

> The legislature is not required to act with perfect precision, and its decision to cast a net wider than what might be absolutely necessary does not transform an otherwise regulatory measure into a punitive sanction.

Pataki, 120 F.3d at 1283. Assuming a choice between affirmative publication to a narrower population and less intrusive publication of registration information to a wider population, only the most concerned of whom are likely to acquire actual knowledge of registration information, the legislative choice made by Alaska in ASORA does not appear punitive.

In summary, the legislative findings, the fact that the notification provisions are codified in the Health, Safety, and Housing Code, and the requirement that persons who are newly convicted of sex crimes must be told of the notification provisions do not evidence a punitive intent on the part of the legislature. Furthermore, the use of a broad but passive notification does not evidence a punitive intent by the legislature. Based upon the foregoing, the court concludes that the legislature did not intend the notification provisions of ASORA to be punitive in nature.

b. Effect

Plaintiffs submit that they have established by the clearest proof that the notification provisions are so punitive in effect that this court is prevented from viewing

them as regulatory or civil in nature, regardless of the legislature's intent. The court must consider the *Mendoza-Martinez* factors in light of the notification provisions of ASORA.

First, plaintiffs submit that the notification provisions impose an affirmative disability or restraint on sex offenders because they provide broad public access to the information with no prior determination of the need for the disclosure and no restrictions on use of the information. In support, plaintiffs refer the court to *Kansas v. Myers*, 923 P.2d 1024, 1041 (Kan. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 2508 (1997). In *Myers*, the Kansas Supreme Court concluded that the public disclosure provisions imposed an affirmative disability or restraint because unrestricted public access to the registered information leaves open the possibility that the registered offender will be subject to public stigma and ostracism. *Id.* The Ninth Circuit in *Russell* noted, however, that the court could not consider the possible " 'vigilante' or illegal responses or citizens to notification." *Russell*, 124 F.3d at 1092. Therefore, the court finds that the public notification provisions do not impose an affirmative disability.

Second, plaintiffs argue that public notification provisions have historically been treated as punishment. The Ninth Circuit in *Russell* concedes that historical punishments such as "pillorying, branding, or the sanction described in Hawthorne's *The Scarlet Letter*" are similar to the public notification provisions of sex offender laws. *Russell*, 124 F.3d at 1091. Moreover, "[n]otification may well subject offenders to humiliation, public opprobrium, ostracism, and the loss of job opportunities." *Id.* at 1092. Yet the court noted that while punishment in the past

often relied upon humiliation, humiliation alone does not constitute punishment because there must be an intent to punish. *Id.* The court went on to conclude that give Washington's restrictions on disclosure, there was no intent to punish; thus, no 'clear proof' of an overwhelming punitive effect. *Id.* Under ASORA, access to registration information is broad, but it is a passive form of notice. The information is available to those who need and care to inquire, and this too fails to constitute clear proof of an overwhelming punitive effect.

The court concludes that even though the public notification provisions may humiliate sex offenders, the provisions do not constitute punishment since there has been no showing of an intent to punish.

The third *Mendoza-Martinez* factor asks the court to consider if the notification provisions only come into play on a finding of *scienter.* The plaintiffs contend that since the notification provisions apply only to those convicted of a crime, ASORA turns on a finding of *scienter.* In rebuttal, defendants submit that, like the registration provisions, the notification provisions are not based on a finding of *scienter,* but on a legislative finding that sex offenders have a "high risk of reoffending" and the conviction is simply the evidentiary basis for that finding. § 1, Ch. 41, SLA 1994. The public notification provisions are based not only upon the *scienter* of the underlying crime but also upon the established high rate of recidivism by sex offenders. The court concludes that ASORA's notification provisions do not have a punitive effect because they are not based alone upon a finding of *scienter.*

Fourth, the plaintiffs do not expressly address the retribution and deterrence factor in light of the notification provisions. But the defendants contend that the deterrent effect of disclosure is little different from the deterrent effect of registration. Single disclosure involves only information that is mostly available from other public sources – voter records and criminal records – the defendants argue that it would be illogical to conclude that disclosure becomes retributive simply by making the information more readily available to the public.

Affirmative notification like that in Washington clearly has a deterrent effect. The court is unconvinced that creating a repository of information regarding sex offenders and making that information available to the public under Alaska law will be as effective a deterrent. In *Russell,* the Ninth Circuit found that while the Washington notification provision had a deterrent effect, it did not implicate the other goal of punishment (retribution) because "it [does not] label [ ] the offender as more culpable that before (though his or her culpability may be more widely publicized)." *Russell,* 124 F.3d at 1091. Thus the court finds that while the Alaska notification provisions may serve as a deterrent, they do not have a retributive effect since the notification provisions do not seek to punish but rather to make more readily available that which is already public information.

The fifth *Mendoza-Martinez* factor considers whether the behavior to which the sanction applies is already a crime. The parties as well as the court in *Russell* do not directly address this factor. However, under Alaska law, the notification provisions apply only to those persons who have been convicted of a criminal offense. Therefore,

the court concludes that the [sic] since the sanction of public notification applies to those already convicted of a crime, this factor weighs in favor of a finding of punitive effect.

The sixth *Mendoza-Martinez* factor looks at the alternative purposes to which the notification provisions may rationally be connected. Plaintiffs admit that there is an alternative purpose to the notification provisions, namely, the protection of the public. Providing access to a registry of sex offenders does allow the public to protect itself if it so chooses; thus, it appears rationally related. The court therefore finds that because the alternative purpose (protection of the public) is served through the Alaska notification provisions, there is no punitive effect.

Finally, the parties consider whether the notification provisions appear excessive in relation to the alternative purpose.

Plaintiffs assert that the notification provisions are excessive in relation to serving the purpose of public notification. In support, they rely upon *Russell* where the Ninth Circuit found that the Washington act was not excessive because it was narrowly tailored and strictly limited so as to achieve the goals of protecting the community from persons who had been determined to pose an actual threat. *Russell*, 124 F.3d at 1089-1091. In response, the defendants argue that the Washington safeguards are necessary only because the Washington statute requires that state agents actively go into a community and notify citizens of the presence of certain sex offenders. The court finds that if it is not excessive to knock on people's doors, then compiling information

under ASORA and making the collected data more readily available to those who need and care to know cannot be considered excessive.

In summary, after analyzing the *Mendoza-Martinez* factors in light of Alaska's public notification provisions, the court concludes that the following indicates a finding that the public notification provisions of ASORA do not have a punitive effect because: (1) providing unrestricted access to the information does not impose an affirmative disability; (2) even though the public notification provisions may humiliate sex offenders, they do not constitute punishment since there has been no showing of an intent to punish; (3) the provisions are not based alone upon a finding of *scienter*; (4) while the provisions serve as a deterrent, they are not retributive; (5) protection of the public is served by the public notification provisions; and (6) the provisions are not excessive in relation to serving the purpose of protecting the public. The ASORA notification provisions have application only to those convicted of a crime.

Based upon the foregoing, the court finds that the plaintiffs have not established by the *clearest proof* that ASORA's notification provisions are so punitive in effect as to overcome the non-punitive, express legislative intent. Therefore, defendants' motion for summary judgment on plaintiffs' *ex post facto* claim as it pertains to the notification provisions is granted. Plaintiffs' cross-motion for summary judgment on this subject is denied.

B.

Impairment of Contracts Clause – Violation of Article I, Section 10

Plaintiffs also move for summary judgment contending that retroactive application of ASORA is barred by Article I, Section 10, of the United State Constitution. Plaintiffs assert that ASORA, by requiring them to register as sex offenders and by providing public disclosure of information, violates the constitutional prohibition of impairment of contracts since their plea agreements did not contain such requirements.

The parties agree, without citing any authority, that the test for determining whether ASORA impairs the Does' plea agreements is whether ASORA materially altered or modified the contract to the extent that a party to the contract is deprived of rights accruing under the original agreement. The parties also seem to agree that this is an issue of Alaska law, not federal law. But the defendants contend that because it is a question of Alaska law, this court lacks jurisdiction to consider plaintiffs' claim because it is barred by the Eleventh Amendment.

The appropriate test for use by this court is not set forth or argued by either of the parties. Article I, Section 10, of the United States Constitution provides in pertinent part: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . . " although the language of the Contracts Clause appears to be absolute, the Supreme Court has recognized that:

> the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the

> promotion of the . . . good of the public, though contracts previously entered into between individuals may thereby be affected.

Manigault v. Springs, 199 U.S. 473, 480 (1905).

The three-part inquiry established by the Supreme Court to determine whether a state law violates Article I, Section 10, requires this court to consider whether: (1) the state law has operated as a substantial impairment to the rights owing to a plaintiff under a contractual relationship; (2) assuming a substantial impairment, the state has demonstrated that a significant and legitimate public purpose justifies the regulation; and (3) the adjustment of the rights and responsibilities of the contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption. *United State Trust Co. v. New Jersey*, 431 U.S. 1 (1977).

For purposes of this discussion, the court assumes, without deciding, that the first *United States Trust Co.* factor (impairment of contract rights) is established. Even if ASORA is considered as a substantial impairment, ASORA was enacted in response to the sexual abuse crisis that exists in Alaska and is intended and designed to protect the public. This is clearly a significant and legitimate public purpose justifying the regulation. Finally, and as discussed at length above, the registration and notification provisions are reasonable and rationally related to the purpose of protecting the public from sex offenders.

Based upon the foregoing, the court concludes that ASORA does not violate Section 10 of Article I of the

United States Constitution. Therefore, defendants' motion for summary judgment on this issue is granted, and plaintiffs' cross-motion is denied.

C.

Right to Privacy

Plaintiffs assert that the public disclosure provisions of ASORA violate the right to privacy under the United States Constitution and under the Alaska Constitution. According to Doe I and Doe II, public notification infringes upon their right to "personal privacy and dignity."[21] Jane Doe alleges that public notification infringes upon her right to privacy because it causes "public intrusion into the marital relationship and causes harm to the wife and family of offenders required to register."[22] Because the privacy rights of Doe I and Doe II differ from those asserted by Jane Doe and because of concerns over whether Jane Doe even has standing to assert her claims, the court addresses these issues individually.

1. Privacy Claims under the United State Constitution

a. John Doe I and John Doe II

In *Whalen v. Roe*, the United State Supreme Court recognized that the Constitution protects two types of privacy interests: (1) "the individual interest in avoiding disclosure of personal matters" and (2) "the interest in

[21] Clerk's Docket No. 107 at 31.

[22] Clerk's Docket No. 107 at 32.

independence in making certain kinds of important decisions." 429 U.S. 589, 599-600 (1977). Plaintiffs allege that state dissemination of criminal history information, current addresses, current place of employment, and "state sponsored intrusions into the family home by neighbors and vigilantes"[23] implicates both types of privacy recognized in *Whalen* because it constitutes the disclosure of personal matters and affects the plaintiffs' independence in making certain kinds of decisions such as where to live and work and, in the case of Jane Doe, whom to marry.

Defendants contend that the information required as part of the notification process is already a matter of public record and that which is in the public record is not protected by any federal right to privacy; therefore, they are entitled to judgment as a matter of law. *McNally v. Pulitzer Publishing Co.*, 532 F.2d 69, 77-78 (8th Cir. 1976), *cert denied*, 429 U.S. 855 (1976). Moreover, the defendants assert that a person does not have a reasonable expectation of privacy as to his physical characteristics, including one's likeness. *United State v. Dionisio*, 410 U.S. 1, 7 (1973).

Plaintiffs put forth several arguments supporting their motion for summary judgment on the grounds that ASORA goes beyond merely releasing information pertaining to Doe I and Doe II's conviction, matters of public record, and their photos, thus violating their right to privacy.

First, under the public notification provisions, a person's current address and place of employment which is not part of the criminal public record is disclosed. In fact,

[23] *Id.* at 31.

as the plaintiffs point out, John Doe I and Doe II's criminal files which are over ten years old contain neither their current home addresses nor their places of employment. Therefore, Doe I and Doe II's addresses and places of employment are not part of the public record. They refer the court to *United State Department of Defense v. FLRA*, 510 U.S. 487 (1994), where the Supreme court held that the federal Privacy Act and the Freedom of Information Act prohibited federal employers from disclosing employees' addresses without their consent because a disclosure of home addressees could lead to the intrusion or misuse of that information, thereby constituting a violation of the right to privacy. Finally, the Does distinguish *Russell* and point out that ASORA has none of the protections which led the Ninth Circuit to find that the public notification provisions of the Washington registration act did not violate the right of privacy because the act provided due process to the offender before the information could be release, not all offenders fell within the public notification provisions, and the information disseminated was severely limited. *Russell*, 124 F.3d at 1094. The Washington law only provided that the general vicinity where the offender resided be released, not the specific address as is done under ASORA. The Ninth Circuit found that the fact that an offender's exact address was not released was important and stated that the Washington act did not violate the right of privacy because "the collection and dissemination of information is carefully designed and narrowly limited." *Id.* at 1093.

The defendants rebut on four grounds. First, they contend that *Russell* – which found no violation of the right to privacy – controls. Moreover, the court in *Russell*

cited *Johnson v. Sawyer*, 47 F.3d 716, 732-33 (5th Cir. 1995) (*en banc*), for its discussion of the common law invasion of privacy. *Johnson* noted that neither street address nor job title could be characterized as private or highly intimate or embarrassing facts about a person's private affairs such that publication would be highly objectionable to a person of ordinary sensibilities. 47 F.3d 716 at 733. Therefore, disclosure of a sex offender's street address or employment should not be considered information protected by the right to privacy under the United State Constitution.

Second, defendants contend that no personal information (information that is private) is disclosed under ASORA because all of the information disclosed under ASORA is available in public records, and they point to the fact that the plaintiffs' addresses are available publicly through voter registration rolls and Alaska Permanent Fund Dividend records.[24] Therefore, defendants assert, Doe I and Doe II have no reasonable expectation of privacy in that which they knowingly expose to the public. The defendants distinguish *Department of Defense v. FLRA* on the grounds that the privacy interest recognized in this case is rooted in federal statutes, not the federal constitution. Finally, defendants contend that the Alaska Legislature found that a sex offender's privacy interest is "less important than the government's interest in public safety" and that "release of certain information about sex offenders to . . . the general public will assist in protection the public safety." § 1, Ch. 41, SLA 1994. This legislative determination, under *Nestor*, 363 U.S. at 617, is

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[24] Although they do not provide proof of this.

subject to attack only upon the basis that it is irrational, which the court finds the plaintiffs have not shown.

This court previously rejected plaintiffs' privacy argument, holding that the right to privacy "does not attach to matters already within the public domain." *Rowe*, 884 F. Supp. at 1384. Here, the court is persuaded by defendants' arguments.

Because the information subject to disclosure is either a matter of public record or is not "highly intimate," the court concludes that the public notification provisions of ASORA do not violate Doe I and Doe II's right to privacy under the United States Constitution. Therefore, defendants' motion for summary judgment on Doe I and Doe II's claims that the public notification provisions of ASORA violate the right to privacy under the United States Constitution is granted. Plaintiffs' cross-motion on this issue is denied.

b. Jane Doe

Jane Doe asserts a claim based upon 42 U.S.C. § 1983. In order to maintain an action under 42 U.S.C. § 1983 she must establish: (1) that the defendants deprived her of a right secured by the Constitution and laws of the United States, and (2) that the defendants deprived her of this right under color of state law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970).

Jane alleges two injuries in fact: (1) violation of her right to privacy under the United States Constitution, and (2) violation of due process because of a deprived liberty interest, *i.e.*, her state granted right of privacy. The crux

of Jane Doe's claim is that she will be injured by release of the information regarding her husband and by release of her home address. She has not shown any actual injury to date, only because an injunction has been in effect since the inception of this lawsuit. Plaintiff refers the court to sealed exhibits which show that family members or registered sex offenders have suffered harm and been stigmatized.[25] In response, defendants contend that Jane Doe lacks standing to raise such a claim and, even is she has standing, that she is not entitled to summary judgment.

The defendants argue that Jane Doe lacks standing to challenge ASORA because she is not subject to ASORA. She is not a sex offender; she is married to one. Moreover, her affidavit does nothing more than speculate that she "will be seriously harmed" by disclosure of her husband's conviction as a sex offender. Finally, they note that the harm alleged to have been suffered by family members of registered sex offenders is really an unavoidable consequence that resulted from a criminal conviction.

The assertion of a loss of constitutional rights constitutes an injury for purposes of standing. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Therefore, Jane Doe, who is asserting a violation of her constitutional rights caused by ASORA, has standing to proceed although she is not a sex offender. *Jane Doe v. Borough of Barrington*, 729 F. Supp. 376 (D. N.J. 1990).

Plaintiff moves for summary judgment on her claims. She urges that her expectation of privacy, unlike that of

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[25] Clerk's Docket No. 101, Exhibits 12, 13, 15 & 16.

Doe I and Doe II, has never been lowered as a result of criminal conduct and that the information which is released as part of ASORA's notification provisions and which is not part of the public record causes public intrusion into the marital relationship and causes harm to the wife and family of offenders required to register.

Under ASORA, the defendants do not disclose any private information pertaining directly and uniquely to Jane Doe. Moreover, this situation is distinguishable from that presented in *Doe v. Borough of Barrington*, 729 F. Supp. 376 (D. N.J. 1990), where the court found that the government violated the privacy rights of a wife when it publicly disclosed that her husband had AIDS because "[t]he stigma of AIDS extends to all family members whether or not they actually have the disease." *Doe*, 729 F. Supp. at 386. Any stigma of being a sex offender extends only to the sex offender and not to the sex offender's family because being a sex offender is not an infectious disease which could conceivably be passed to one's spouse. Therefore, the court concludes that while Jane Doe has standing to assert a violation of her constitutional right to privacy, she has not come forward with any evidence tending to show that her several or separate privacy rights have been violated. Defendants' motion for summary judgment as to Jane Doe's civil rights claim is granted, and Jane Doe's motion for summary judgment is denied.

2. Privacy Claims under the Alaska Constitution

The court next turns to Doe I and Doe II's claim that ASORA's public notification provisions violate the

express guarantee of a right to privacy afforded by the Alaska Constitution. In their cross-motion for summary judgment, plaintiffs assert that they are moving for summary judgment on this issue. Defendants rebut, arguing that this court lacks subject matter jurisdiction to hear this claim based upon Eleventh Amendment immunity.[26]

Plaintiffs submit that defendants are "belatedly recharacterizing the [plaintiffs'] claims to be claims based on a violation of state law, which they are not."[27] Rather, plaintiffs say that they are not directly asserting state law claims arising under the Alaska Constitution. Plaintiffs' assertion is contradicted by their amended complaint. Plaintiffs expressly title Count III of their amended complaint "Pendant State Law Claims for Declaratory Judgment"[28] which includes an allegation that ASORA violates plaintiff's expectation of privacy protected by Article I, Section 22, of the Alaska Constitution.

In their Count III, plaintiffs have plainly asserted against the defendants a state claim. State law claims for violation of a right to privacy arising under the Alaska Constitution cannot be considered by this court because

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[26] Eleventh Amendment immunity does not extend to suits seeking declaratory and injunctive relief against state officers in their individual capacities for their failure to protect federal statutory or Constitutional rights. Therefore, the court can hear plaintiffs claims base on violations of federal laws.

[27] Plaintiffs' Reply Memorandum at 3, Clerk's Docket No. 113.

[28] Clerk's Docket No. 10.

they are barred by the Eleventh Amendment.[29] *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 121 (1984). Defendants are granted summary judgment as to plaintiffs' state law claims.

D.

Due Process

The United States Constitution protects persons from the deprivation of liberty without due process of law. U.S. Const. Amend. XIV. Doe I and Doe II contend that ASORA deprives them of due process of law in violation of the Fourteenth Amendment of the United States Constitution on the following grounds: (1) because the United State Constitution grants them a right to privacy, a liberty interest, which is violated by the release of information under the notification provisions of ASORA without sufficient due process; (2) the Alaska Constitution expressly guarantees a right of privacy, therefore a liberty interest exists and ASORA violates the Due Process Clause of the United States Constitution by infringing upon that liberty interest;[30] and (3) the Alaska Constitution grants a right to rehabilitation and reintegration which is abrogated by the state attaching conditions on that reintegration and by the state's broadcasting private information to the world which interferes with the registrant's ability to

[29] This also applies to plaintiffs' claims that ASORA violates the Alaska Constitution because it constitutes a denial of due process inconsistent with Article I, Section 7, an *ex post facto* law prohibited by Article I, Section 15, and a violation of the equal protection clause guaranteed by Article I, Section 12.

[30] Jane Doe also asserts this claim.

work, seek housing, and to interact with other members of the community. The parties cross-move for summary judgment on the claims.

Because this court found that none of the plaintiffs have a privacy interest protected by the United State Constitution, the court finds no liberty interest at stake. This is consistent with *Russell*. 124 F. 3d at 1094. Therefore, defendants' motion for summary judgment . this issue is granted and plaintiffs' cross-motion is denied.

The crux of plaintiffs' second ground for asserting a violation of the Due Process Clause of the United States Constitution is that the Alaska Constitution expressly guarantees a right of privacy, therefore, a liberty interest exists and ASORA violates the Due Process Clause of the United States Constitution by infringing upon that liberty interest.

Defendants dismiss this argument on the basis that plaintiffs are trying to disguise a state law claim barred by the Eleventh Amendment and defendants elect not to address the argument at all. However, an alternative way for litigants to bring state law claims into federal court is to argue, as plaintiffs have done, that the state law, here the Alaska Constitution, gives rise to a liberty interest protected by the Due Process Clause. Edwin Chemerinsky, *Federal Jurisdiction*, § 7.5.

According to the plaintiffs, this creates a federally protected liberty interest. In support, they refer to two Alaska Supreme Court cases which concluded that the right to privacy is liberty interest. *See Breese v. Smith*, 501 P.2d 159 (Alaska 1972), and *Ravin v. State*, 537 P.2d 494 (Alaska 1975). The crux of the plaintiffs' claim is that the

legislature has done what the voters had intended Article I, Section 22, to prevent. By releasing sex offenders' home addresses, ASORA invaded the offenders' right to live peaceably in their homes, their right to association with family and friends, and their right to work. Moreover, this invasion of the right to privacy is done without notice and opportunity to be heard and without first making a determination of the need for each disclosure by finding that the individual subject to disclosure actually presents a threat to the public. Thus, plaintiffs posit, ASORA denies due process.

The court in *Russell* found no due process violation because they found no violation of the right to privacy. However, the court in *Russell* was confronted only with a challenge to the United States Constitution. The situation in Alaska may warrant a different result. First, the Alaska Constitution, unlike the United States Constitution, expressly provides for a right of privacy.

Under Alaska law, this gives rise to a liberty interest. Further, the Washington law provides for a notice and opportunity to be heard before public disclosure is made.

The test for determining what process is due an individual subject to a possible deprivation of a protected liberty interest is set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). The court must consider: (1) the private interest that will be affected by the official action; (2) the risk of erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards: and (3) the defendant's interest, including the function involved and the fiscal and administrative burdens that the additional

or substitute procedural requirements would entail. 424 U.S. at 335. The parties provide the court with no appropriate analysis of the facts of this case using the test set forth in *Mathews*. Therefore, plaintiffs' motion for summary judgment on this issue is denied with leave to renew. Defendants' motion for summary judgment on the grounds that plaintiffs' due process claim is barred by the Eleventh Amendment is denied.

Plaintiffs' third grounds for asserting a violation of the Due Process Clause of the United States Constitution is that the Alaska Constitution grants a right to rehabilitation and reintegration which is abrogated by the defendants' attaching conditions on that reintegration and by the state's release of information which interferes with the registrant's ability to work, seek housing, and to interact with other members of the community.[31]

Article I, Section 12, of the Alaska Constitution has been interpreted as granting to an offender the right to rehabilitate and reintegrate with all those rights possessed by any other member of the public:

> the public is not the sole beneficiary of this constitutional requirement. The constitution speaks of penal administration being based on the "principle of reformation." Reformation relates to something being done to rehabilitate the offender into a noncriminal member of society. True, society will benefit from this, but so will the offender since, to the extent that he is

[31] Defendants again elect not to address this argument and instead rely upon the fact that plaintiffs are merely disguising a state law claim barred by the Eleventh Amendment.

> rehabilitated into a law-abiding person, his inherent dignity as a human being will be enhanced. He will be the object of respect, rather that of fear and loathing by his fellow citizens, and to that extent, will benefit from the sense of personal satisfaction enjoyed by those who live decent lives, unsullied by disobedience and rebellion against the laws by which we govern ourselves in a peaceful and tranquil society.

Abraham v. Alaska, 585 P.2d 526, 531 (Alaska 1978).

Therefore, the gravamen of plaintiffs' argument is that Doe I and Doe II had a federally protected right to meaningful access to rehabilitation and to full integration which includes the right to unconditionally reenter society with all civil rights restored and to then live a normal life and not be the object of fear or loathing by fellow citizens. ASORA allegedly violates plaintiffs' reentry rights from a federal constitutional perspective by placing conditions on that reentry by requiring persons convicted of sex offenses to register with the authorities and to periodically report to the authorities as if they were on court probation without an opportunity to be heard.

Because the parties again failed to provide the court with an analysis of this argument and the pertinent facts in this case in light of the framework established by the United State Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), the court denies plaintiffs' motion for summary judgment with leave to renew.

E.

Fourteenth Amendment – Equal Protection
and
Fourth Amendment – Search and Seizure

Although plaintiffs contend they are moving for summary judgment on all of their claims, plaintiffs put forth no discussion of their claim that ASORA violates the equal protection clause of the Fourteenth Amendment. Plaintiffs also fail to provide a discussion of their claim that the fingerprinting and photographing requirements of ASORA violate the Fourth Amendment of the United State Constitution.

A motion for summary judgment must contain a "brief statement of points and authorities relevant to the relief requested." D. Ak. L.R. 7.1(a)(2). The failure to include proper materials in support of a motion subjects the motion to summary ruling by the court *sua sponte*. D. Ak. L.R. 7.1(d). Therefore, plaintiffs' motion for summary judgment on these two constitutional issues is denied with leave to renew upon the proper filing of an applicable statement of points and authorities pertaining to them.

CONCLUSION

Based upon the foregoing: (1) defendants' motion for summary judgment on plaintiffs' *ex post facto* claims is granted, and plaintiffs' cross-motion for summary judgment is denied;[32] (2) defendants' motion for summary

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[32] *See* pages 7 through 32, *infra*.

judgment on plaintiffs' Contracts Clause claim is granted, and plaintiff's cross-motion for summary judgement is denied;[33] (3) defendants' motion for summary judgment on plaintiffs' federal right to privacy claims is granted, and plaintiffs' cross-motion for summary judgment is denied;[34] (4) defendants' motion for summary judgment on plaintiffs' Count III, pendant state law claims, is granted, and plaintiffs' cross-motion for summary judgment is denied;[35] (5) defendants' motion for summary judgment on plaintiffs' federal due process claims is granted as to plaintiffs' federal privacy interest claims, but denied as to plaintiffs' claims of federal due process based upon state privacy interests and state right to rehabilitation and reintegration, and plaintiffs' cross-motion for summary judgment is denied with leave to renew as to federal due process based upon state rights;[36] (6) plaintiffs' motion for summary judgment on their Fourteenth Amendment (equal protection) and Fourth Amendment (search and seizure) claims are denied with leave to renew.[37] If no such renewed motion(s) is filed on or before April 30, 1999, the court will deem plaintiffs to have abandoned these claims, and the clerk of court shall enter judgment dismissing plaintiffs' complaint with prejudice and vacating the preliminary injunction.

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[33] *See* pages 32 through 34, *infra*.

[34] *See* pages 34 through 42, *infra*.

[35] *See* pages 42 through 43, *infra*.

[36] *See* pages 43 through 48, *infra*.

[37] *See* pages 48 through 49, *infra*.

DATED at Anchorage, Alaska, this 31 day of March, 1999.

/s/ H. Russel Holland
H. Russel Holland, Judge
District of Alaska

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

JOHN DOE I, et al.,
Plaintiffs,
vs.
RONALD O. OTTE, Commissioner, et al.,
Defendants.

No. A94-0206-CV (HRH)

ORDER

(Filed August 12, 1999)

Cross-Motions for Summary Judgment

Plaintiffs move for summary judgment on their claim that the Alaska Sex Offender Registration Act ("ASORA") violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution.[1] Defendants oppose and cross-move for summary judgment.[2] Oral argument has not been requested and is deemed unnecessary.

Facts

Plaintiffs are two convicted sex offenders, John Doe I and John Doe II, and Jane Doe, wife of John Doe I. They are challenging Alaska's Sex Offender Registration Act

[1] Clerk's Docket No. 119.

[2] Clerk's Docket No. 123.

("ASORA"), AS 12.63.010-12.63.100 and AS 18.65.087. Defendants are Ronald L. Otte, Commissioner of the Department of Public Safety for the State of Alaska, and Bruce M. Bothelo, Attorney General for the state of Alaska. They are named in both their official and individual capacitites.

On March 31, 1999, the court granted defendants' motion for summary judgment[3] on all but two issues.[4] The plaintiffs' cross-motion[5] was denied, but they were granted leave to renew their federal due process claims that were based on alleged violations of their state-created constitutional rights to privacy and rehabilitation.[6] These claims are now the subject of the parties' pending cross-motions for summary judgment.

Discussion

Plaintiffs move for summary judgment asserting that ASORA violates the Fourteenth Amendment, Due Process Clause, of the United States Constitution because it invades important liberty interests granted by the Alaska

[3] Clerk's Docket No. 95.

[4] Clerk's Docket No. 118.

[5] Clerk's Docket No. 107.

[6] Clerk's Docket No. 118, at 48-49. Plaintiffs were also granted leave to renew two additional claims which they expressly abandon in this motion for summary judgment: whether ASORA violates the Does' Fourth Amendment right to be free from unreasonable search and seizure, and whether ASORA violates the Equal Protection Clause of the Fourteenth Amendment. Memorandum of Points and Authorities at 2, Clerk's Docket No. 119.

Constitution. The defendants cross-move for summary judgment. The parties acknowlede that resolution of these cross-motions would require a determination of whether ASORA violates certain provisions of the Alaska Constitution: the right to privacy granted by article I, section 22; the right to travel, the right to be let alone, and the right to be free from governmental control granted by article I, section 1; and the right to rehabilitation and reintegration guaranteed by article I, section 12.

At the time the parties' cross-motions were filed, the state courts of Alaska had not yet considered whether ASORA violated the Alaska Constitution and defendants urged this court to certify the issue to the Alaska Supreme Court. On July 23, 1999, the Alaska Court of Appeals issued its decision in *Patterson v. State*, ___ P.2d ___, No. A-6718, slip op. 1641 (Alaska App., July 23, 1999). In *Patterson*, the Alaska Court of Appeals held that ASORA does not violate the right to privacy under article I, section 22, of the Alaska Constitution.[7] *Id.* at 19-20. The court also held that ASORA did not violate the substantive due process clause because it does not infringe upon a sex offender's right to travel, obtain employment, and personal safety. *Id.* at 21.

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[7] Plaintiffs assert that Alaska law gives them a right to be left alone and to be free of government control. To the extent that there is a right to be left alone, it is a subset of the plaintiffs' Article I, Section 22, right to privacy under the Alaska Constitution. ASORA does not violate plaintiffs' right to be left alone. Article I, Section 1, does not contain a right to be free of government control.

While the court in *Patterson* did not address the right to rehabilitation or reintegration, the court noted that Patterson had not show [sic] any adverse impact on "any liberty interest." *Id.* at 21. Even assuming a liberty interest existed arising from the right to rehabilitation and reintegration, a statute violates substantive due process under Alaska law only if the statute has no reasonable relationship to a legitimate governmental purpose. *Id.* at 21-22. Since the registration and notification provisions according to *Patterson* are rationally related to the legitimate purpose of ensuring public safety, *id.*, there is no violation of substantive due process. Moreover, the right to rehabilitation and reintegration is coupled with other important constitutional considerations in article I, section 12, of the Alaska Constitution which provides:

> Criminal administration shall be based upon the following: the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and the principle of reformation.[8]

Thus in making provision for reformation of persons such as Doe I and II, the Alaska Legislature was bound to consider and make provision for the protection of the public as well as reformation of criminals. Plaintiffs have not shown that ASORA fails to strike a proper balance between reformation of sex offenders and protection of the public.

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[8] Article I, section 12, so reads today. When this suit was commenced, that section read:

> Penal administration shall be based on the principle of reformation and upon the need for protecting the public.

The Alaska Court of Appeals determined the ASORA does not violate the Alaska Constitution; therefore, there is no state granted liberty interest which can be protected by the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Although the issues raised by Jane Doe were not before the Alaska Court of Appeals in *Patterson,* defendants are entitled to summary judgment on Jane Doe's claim that ASORA violates her right to privacy granted by the Alaska Constitution. If Doe I does not have a right to privacy afforded by the Alaska Constitution, Jane Doe's claim must fall [sic] also because she has made no showing that the provisions of ASORA were directed towards her, and under ASORA the defendants do not disclose any private information pertaining directly or uniquely to Jane Doe.

Conclusion

Based on the foregoing, plaintiffs' motion for summary judgment is denied and defendants' cross-motion for summary judgment in [sic] granted. The clerk of court shall enter judgment dismissing plaintiffs' complaint with prejudice.

DATED at Anchorage, Alaska, this 12 day of August, 1999.

/s/ H. Russel Holland
H. Russel Holland, Judge
District of Alaska

UNITED STATES COURT OF APPEALS,
FOR THE NINTH CIRCUIT

No. 99-35845
D.C. No. CV-94-206-HRH

JOHN DOE I, JANE DOE, AND JOHN DOE II,
PLAINTIFFS-APPELLANTS

v.

RONALD O. OTTE AND BRUCE M. BOTELHO,
DEFENDANTS-APPELLEES

[Filed: September 6, 2001]

Before D. NELSON, REINHARDT, and THOMAS, Circuit Judges:

The panel has voted to deny the petition for rehearing. Judges Reinhardt and Thomas have voted to deny the petition for rehearing en banc and Judge D. Nelson so recommends.

The full court has been advised of the petition for rehearing en banc and no active judge has requesteded a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and petition for rehearing en banc are denied.

UNITED STATES COURT OF APPEALS,
FOR THE NINTH CIRCUIT

No. 99-35845
D.C. No. CV-94-206-HRH

JOHN DOE I, JANE DOE, AND JOHN DOE II,
PLAINTIFFS-APPELLANTS

v.

RONALD O. OTTE AND BRUCE M. BOTELHO,
DEFENDANTS-APPELLEES

[Filed: August 23, 2001]

Before D. NELSON, REINHARDT, and THOMAS, Circuit Judges:

The panel has voted to deny the petition for rehearing. Judges Reinhardt and Thomas have voted to deny the petition for rehearing en banc and Judge D. Nelson so recommends.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and petition for rehearing en banc are denied.

ALASKA STATUTORY AND
REGULATORY PROVISIONS INVOLVED

STATUTES

1994 Alaska Session Laws ch. 41, § 1 provides:

> The legislature finds that
>
> (1) sex offenders pose a high risk of reoffending after release from custody;
>
> (2) protecting the public from sex offenders is a primary governmental interest;
>
> (3) the privacy interests of persons convicted of sex offenses are less important than the government's interest in public safety; and
>
> (4) release of certain information about sex offenders to public agencies and the general public will assist in protecting public safety.

1994 Alaska Session Laws ch. 41, § 12(a) provides:

> A sex offender with only one conviction for a sex offense who has been unconditionally discharged from that sex offense before July 1, 1984, is not required to register under AS 12.63.010, added by sec. 4 of this Act. A sex offender who has been unconditionally discharged from a sex offense on or after July 1, 1984, but before the effective date of this Act, shall register under AS 12.63.010, added by sec. 4 of this Act, by July 1, 1994. A sex offender with two or more convictions for a sex offense before the effective date of this Act, regardless of whether the sex offender was unconditionally

released from the sex offense before, on, or after July 1, 1984, shall register under AS 12.63.010, added by sec. 4 of this Act, by July 1, 1994.

Alaska Statute 11.61.030 provides in part:

(a) A person commits the crime of misconduct involving weapons in the third degree if the person

(1) knowingly possesses a firearm capable of being concealed on one's person after having been convicted of a felony or adjudicated a delinquent minor for conduct that would constitute a felony if committed by an adult by a court of this state, a court of the United States, or a court of another state or territory[.]

Alaska Statute 12.63.010 provides:

(a) A sex offender or child kidnapper who is physically present in the state shall register as provided in this section. The sex offender or child kidnapper shall register

(1) within the 30-day period before release from an in-state correctional facility;

(2) by the next working day following conviction for a sex offense or child kidnapping if the sex offender is not incarcerated at the time of conviction; or

(3) by the next working day of becoming physically present in the state.

(b) A sex offender or child kidnapper required to register under (a) of this section shall register with the Department of Corrections if the sex offender or child kidnapper is incarcerated or in person at the Alaska state trooper post or municipal police department located nearest to where the sex offender or child kidnapper resides at the time of registration. To fulfill the registration requirement, the sex offender or child kidnapper shall

(1) complete a registration form that includes, at a minimum,

(A) the sex offender's or child kidnapper's name, address, place of employment, date of birth;

(B) each conviction for a sex offense or child kidnapping for which the duty to register has not terminated under AS 12.63.020, date of sex offense or child kidnapping convictions, place and court of sex offense or child kidnapping convictions, whether the sex offender or child kidnapper has been unconditionally discharged from the conviction for a sex offense or child kidnapping and the date of the unconditional discharge; if the sex offender or child kidnapper asserts that the offender or kidnapper has been unconditionally discharged, the offender or kidnapper shall supply proof of that discharge acceptable to the department;

(C) all aliases used;

(D) driver's license number;

(E) description, license numbers, and vehicle identification numbers of motor vehicles the sex offender or child kidnapper has access to regardless of whether that access is regular or not;

(F) any identifying features of the sex offender or child kidnapper;

(G) anticipated changes of address; and

(H) a statement concerning whether the offender or kidnapper has had treatment for a mental abnormality or personality disorder since the date of conviction for an offense requiring registration under this chapter;

(2) allow the Alaska state troopers, Department of Corrections, or municipal police to take a complete set of the sex offender's or child kidnapper's fingerprints and to take the sex offender's or child kidnapper's photograph.

(c) If a sex offender or child kidnapper changes residence after having registered under (a) of this section, the sex offender or child kidnapper shall provide written notice of the change by the next working day following the change to the Alaska state trooper post or municipal police department located nearest to the new residence or, if the residence change is out of state, to the central registry.

(d) A sex offender or child kidnapper required to register

(1) for 15 years under (a) of this section and AS 12.63.020(a)(2) shall, annually, during the term of a duty to register under AS 12.63.020, on a date set by the department at the time of the sex offender's or child kidnapper's

initial registration, provide written verification to the department, in the manner required by the department, of the sex offender's or child kidnapper's address and notice of any changes to the information previously provided under (b)(1) of this section;

(2) for life under (a) of this section and AS 12.63.020(a)(1) shall, not less than quarterly, on a date set by the department, provide written verification to the department, in the manner required by the department, of the sex offender's or child kidnapper's address and any changes to the information previously provided under (b)(1) of this section.

(e) The registration form required to be submitted under (b) of this section and the annual or quarterly verifications must be sworn to by the offender or kidnapper and contain an admonition that a false statement shall subject the offender or kidnapper to prosecution for perjury.

(f) In this section, "correctional facility" has the meaning given in AS 33.30.901

Alaska Statute 12.63.020 provides:

(a) The duty of a sex offender or child kidnapper to comply with the requirements of AS 12.63.010 for each sex offense or child kidnapping

(1) continues for the lifetime of a sex offender or child kidnapper convicted of

(A) one aggravated sex offense; or

(B) two or more sex offenses, two or more child kidnappings, or one sex offense and one child kidnapping; for purposes of this section, a person convicted of indecent exposure before a person under 16 years of age under AS 11.41.460 more than two times has been convicted of two or more sex offenses;

(2) ends 15 years following the sex offender's or child kidnapper's unconditional discharge from a conviction for a single sex offense that is not an aggravated sex offense or for a single child kidnapping if the sex offender or child kidnapper has supplied proof that is acceptable to the department of the unconditional discharge; the registration period under this paragraph

(A) is tolled for each year that a sex offender or child kidnapper

(i) fails to comply with the requirements of this chapter;

(ii) is incarcerated for the offense or kidnapping for which the offender or kidnapper is required to register or for any other offense;

(B) may include the time a sex offender or child kidnapper was absent from this state if the sex offender or child kidnapper has complied with any sex offender or child kidnapper registration requirements of the jurisdiction in which the offender or kidnapper was located and if the sex offender or child kidnapper provides the department with proof of the compliance while the sex offender or child kidnapper was absent from this state; and

(C) continues for a sex offender or child kidnapper who has not supplied proof acceptable to the department of the offender's or kidnapper's unconditional discharge for the sex offense or child kidnapping requiring registration.

(b) The department shall adopt, by regulation, procedures to notify a sex offender or child kidnapper who, on the registration form under AS 12.63.010, lists a conviction for a sex offense or child kidnapping that is a violation of a former law of this state or a law of another jurisdiction, of the duration of the offender's or kidnapper's duty under (a) of this section for that sex offense or child kidnapping. As a part of the regulations, the department shall require the offender or kidnapper to supply proof acceptable to the department of unconditional discharge and the date it occurred.

Alaska Statute 12.63.030 provides:

(a) If a sex offender or child kidnapper notifies the department that the sex offender or child kidnapper is moving from the state, the department shall notify the Federal Bureau of Investigation and the state where the sex offender or child kidnapper is moving of the sex offender's or child kidnapper's intended address.

(b) If a sex offender or child kidnapper fails to register or to verify the sex offender's or child kidnapper's address and registration under this chapter, or the department does not

know the location of a sex offender or child kidnapper required to register under this chapter, the department shall immediately notify the Federal Bureau of Investigation.

Alaska Statute 12.63.100 provides:

In this chapter,

(1) "aggravated sex offense" means

(A) a crime under AS 11.41.100(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit a sexual offense, or a similar offense under the laws of the other jurisdiction; in this subparagraph, "sexual offense" has the meaning given in AS 11.41.100(a)(3);

(B) a crime under AS 11.41.110(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit one of the following crimes, or a similar law of another jurisdiction:

(i) sexual assault in the first degree;

(ii) sexual assault in the second degree;

(iii) sexual abuse of a minor in the first degree; or

(iv) sexual abuse of a minor in the second degree; or

(C) a crime, or an attempt, solicitation, or conspiracy to commit a crime, under AS 11.41.410, 11.41.434, or a similar law of another jurisdiction;

(2) "child kidnapping" means

(A) a crime under AS 11.41.100(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit kidnapping;

(B) a crime under AS 11.41.110(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit kidnapping if the victim was under 18 years of age at the time of the offense; or

(C) a crime, or an attempt, solicitation, or conspiracy to commit a crime, under AS 11.41.300, or a similar law of another jurisdiction, if the victim was under 18 years of age at the time of the offense;

(3) "conviction" means that an adult, or a juvenile charged as an adult under AS 47.12 or a similar procedure in another jurisdiction, has entered a plea of guilty, guilty but mentally ill, or nolo contendere, or has been found guilty or guilty but mentally ill by a court or jury, of a sex offense or child kidnapping regardless of whether the judgment was set aside under AS 12.55.085 or a similar procedure in another jurisdiction or was the subject of a pardon or other executive clemency; "conviction" does not include a judgment that has been reversed or vacated by a court.

(4) "department" means the Department of Public Safety;

(5) "sex offender or child kidnapper" means a person convicted of a sex offense or child kidnapping in this state or another jurisdiction regardless of whether the conviction occurred before, after, or on January 1, 1999;

(6) "sex offense" means

(A) a crime under AS 11.41.100(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit a sexual offense, or a similar offense under the laws of the other jurisdiction; in this subparagraph, "sexual offense" has the meaning given in AS 11.41.100(a)(3);

(B) a crime under AS 11.41.110(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit one of the following crimes, or a similar law of another jurisdiction:

(i) sexual assault in the first degree;

(ii) sexual assault in the second degree;

(iii) sexual abuse of a minor in the first degree; or

(iv) sexual abuse of a minor in the second degree;

(C) a crime, or an attempt, solicitation, or conspiracy to commit a crime, under the following statutes or a similar law of another jurisdiction:

(i) AS 11.41.410 – 11.41.438;

(ii) AS 11.41.440(a)(2);

(iii) AS 11.41.450 – 11.41.458;

(iv) AS 11.41.460 if the indecent exposure is before a person under 16 years of age and the offender has a previous conviction for that offense;

(v) AS 11.61.125 or 11.61.127;

(vi) AS 11.66.110 or 11.66.130(a)(2) if the person who was induced or caused to engage in prostitution was 16 or 17 years of age at the time of the offense; or

(vii) former AS 11.15.120, former 11.15.134, or assault with the intent to commit rape under former AS 11.15.160, former AS 11.40.110, or former 11.40.200;

(7) "unconditional discharge" has the meaning given in AS 12.55.185

Alaska Statute 18.65.087 provides:

(a) The Department of Public Safety shall maintain a central registry of sex offenders and child kidnappers and shall adopt regulations necessary to carry out the purposes of this section and AS 12.63. A post of the Alaska state troopers or a municipal police department that receives registration or change of address information under AS 12.63.010 shall forward the information within five working days of receipt to the central registry of sex offenders and child kidnappers. Unless the sex offender or child kidnapper provides proof satisfactory to the department that the sex offender or child kidnapper is not physically present in the state or that the time limits described in AS 12.63.010 have passed, the Department of Public Safety may enter and maintain in the registry information described in AS 12.63.010 about a sex offender or child kidnapper that the department obtains from

(1) the sex offender or child kidnapper under AS 12.63;

(2) a post of the Alaska state troopers or a municipal police department under (a) of this section;

(3) a court judgment under AS 12.55.148;

(4) the Department of Corrections under AS 33.30.012 or 33.30.035;

(5) the Federal Bureau of Investigation or another sex offender registration agency outside this state if the information indicates that a sex offender or child kidnapper is believed to be residing or planning to reside in the state or cannot be located;

(6) a criminal justice agency in the state or another jurisdiction;

(7) the department's central repository under AS 12.62; information entered in the registry from the repository is not subject to the requirements of AS 12.62.160(c)(3) or (4); or

(8) another reliable source as defined in regulations adopted by the department.

(b) Information about a sex offender or child kidnapper that is contained in the central registry, including sets of fingerprints, is confidential and not subject to public disclosure except as to the sex offender's or child kidnapper's name, aliases, address, photograph, physical description, description of motor vehicles, license numbers of motor vehicles, and vehicle identification numbers of motor vehicles, place of employment, date of birth, crime for which convicted, date of conviction, place and court of

conviction, length and conditions of sentence, and a statement as to whether the offender or kidnapper is in compliance with requirements of AS 12.63 or cannot be located.

(c) Notwithstanding (b) of this section, if a sex offender has been convicted in this state or another jurisdiction of a sex offense identified as "incest," that offense may be disclosed under (b) of this section only as a "felony sexual abuse of a minor" conviction.

(d) The Department of Public Safety

(1) shall adopt regulations to

(A) allow a sex offender or child kidnapper to review sex offender or child kidnapper registration information that refers to that sex offender or child kidnapper, and if the sex offender or child kidnapper believes the information is inaccurate or incomplete, to request the department to correct the information; if the department finds the information is inaccurate or incomplete, the department shall correct or supplement the information;

(B) ensure the appropriate circulation to law enforcement agencies of information contained in the central registry;

(C) ensure the anonymity of members of the public who request information under this section;

(2) shall provide to the Department of Corrections and municipal police departments the forms and directions necessary to allow sex offenders and child kidnappers to comply with AS 12.63.010;

(3) may adopt regulations to establish fees to be charged for registration under AS 12.63.010 and for information requests; the fee for registration shall be based upon the actual costs of performing the registration and maintaining the central registry but may not be set at a level whereby registration is discouraged; the fee for an information request may not be greater than $10;

(4) shall remove from the central registry of sex offenders and child kidnappers under this section information about a sex offender or child kidnapper required to register under AS 12.63.020(a)(2) at the end of the sex offender's or child kidnapper's duty to register if the offender or kidnapper has not been convicted of another sex offense or child kidnapping and the offender or kidnapper has supplied proof of unconditional discharge acceptable to the department; in this paragraph, "sex offense" and "child kidnapping" have the meanings given in AS 12.63.100.

(e) The name, address, and other identifying information of a member of the public who makes an information request under this section is not a public record under AS 40.25.100 – 40.25.220.

ADMINISTRATIVE REGULATIONS

13 Alaska Administrative Code § 09.025 provides:

(a) The department will approve or provide forms for an offender or a registration

agency to submit registration information to the department, including

(1) initial registration information required under AS 12.63.010(b)(1);

(2) a photograph required under AS 12.63.010(b)(2);

(3) a set of fingerprints required under AS 12.63.010(b)(2);

(4) notice of change of address required under AS 12.63.010(c);

(5) annual or quarterly verification of registration information required under AS 12.63.010(d);

(6) proof of unconditional discharge date as provided in AS 12.63.020(a)(2)(A) and (C) and 12.63.020(b);

(7) proof of compliance with a sex offender registration program in a jurisdiction outside this state as provided in AS 12.63.020(a)(2)(B);

(8) proof that an offender is not physically present in this state as provided in AS 18.65.087(a);

(9) a request to review or have corrected information maintained in the registry about the offender as provided in AS 18.65.087(d);

(10) a request to appeal an adverse decision under (9) of this subsection.

(b) The department's forms will contain a notice that offenders who move out of this state must comply with registration requirements of their new locations.

(c) When an offender appears in person to submit information to a registration agency, the registration agency shall collect the information from the offender on a form approved or provided by the department. The registration agency shall review the completed form in the presence of the offender. If the form or any document submitted in connection with the form has obvious discrepancies, is incomplete, or is not legible, the registration agency may not accept the form until the offender makes all necessary corrections.

(d) When an offender submits a registration form to a registration agency without appearing in person, the registration agency shall review the form. If the form or any document submitted in connection with the form has obvious discrepancies, is incomplete, or is not legible, the registration agency will notify the offender of the need for corrections and may not accept the form until the offender makes all necessary corrections.

(e) If registration information is accepted by a registration agency, an offender is considered to have submitted the information on the date that

(1) it is delivered in person to a registration agency;

(2) it is postmarked, if mailed;

(3) delivery is documented according to written instructions on a registration form, if a method of delivery other than in-person or mail is approved by the department.

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13 Alaska Administrative Code § 09.030 provides:

(a) Within 90 days after an offender registers under this chapter, the department will mail the offender a registration verification form that includes, based on the most recent information the department has obtained about the offender under AS 18.65.087(a),

(1) a statement of the duration of the offender's duty to register;

(2) an explanation of the annual or quarterly schedule by which the offender must submit registration verification information to the department for the duration of the offender's duty to register;

(3) the name of the offender's registration agency.

(b) If five or more years have passed since the date of an offender's registration photograph or there is another reason to believe the offender's appearance has changed significantly, a registration agency may instruct the offender in writing

(1) to appear in person at the registration agency to allow a photograph to be taken; or

(2) if authorized in writing by the department, to submit a new photograph without appearing in person.

UTAH STATUTORY PROVISION INVOLVED

Utah Code § 77-27-21.5 provides:

(1) As used in this section:

(a) "Department" means the Department of Corrections.

(b) "Notification" means a person's acquisition of information from the department about a sex offender, including his place of habitation, physical description, and other information as provided in Subsections (11) and (12).

(c) "Register" means to comply with the rules of the department made under this section.

(d) "Sex offender" means any person:

(i) convicted by this state of:

(A) Section 76-4-401, enticing a minor over the Internet;

(B) Section 76-5-301.1, kidnapping of a child;

(C) a felony violation of Section 76-5-401, unlawful sexual activity with a minor;

(D) Section 76-5-401.1, sexual abuse of a minor;

(E) Section 76-5-401.2, unlawful sexual conduct with a 16 or 17 year old;

(F) Section 76-5-402, rape;

(G) Section 76-5-402.1, rape of a child;

(H) Section 76-5-402.2, object rape;

(I) Section 76-5-402.3, object rape of a child;

(J) a felony violation of Section 76-5-403, forcible sodomy;

(K) Section 76-5-403.1, sodomy on a child;

(L) Section 76-5-404, forcible sexual abuse;

(M) Section 76-5-404.1, sexual abuse of a child or aggravated sexual abuse of a child;

(N) Section 76-5-405, aggravated sexual assault;

(O) Section 76-5a-3, sexual exploitation of a minor;

(P) Section 76-7-102, incest;

(Q) Section 76-9-702.5, lewdness involving a child;

(R) Section 76-10-1306, aggravated exploitation of prostitution; or

(S) attempting, soliciting, or conspiring to commit any offense listed in Subsection (1)(d)(i)(A), (B), (C), (E) through (P), or (R);

(ii) convicted by any other state or the United States government of an offense which if committed in this state would be punishable as one or more of the offenses listed in Subsection (1)(d)(i) and who is:

(A) a Utah resident; or

(B) not a Utah resident, but who is in the state for a period exceeding 14 consecutive days, or for an aggregate period exceeding 30 days, during any calendar year; or

(iii) who is found not guilty by reason of insanity of one or more offenses listed in Subsection (1)(d)(i).

(2) The department, to assist in investigating sex-related crimes and in apprehending offenders, shall:

(a) develop and operate a system to collect, analyze, maintain, and disseminate information on sex offenders and sex offenses; and

(b) make information collected and developed under this section available to the public.

(3) Any law enforcement agency shall, in the manner prescribed by the department, inform the department of:

(a) the receipt of a report or complaint of an offense listed in Subsection (1)(d), within three working days; and

(b) the arrest of a person suspected of any of the offenses listed in Subsection (1)(d), within five working days.

(4) Upon convicting a person of any of the offenses listed in Subsection (1)(d), the convicting court shall within three working days forward a copy of the judgment and sentence to the department.

(5) A sex offender in the custody of the department shall be registered by agents of the department upon:

(a) being placed on probation;

(b) commitment to a secure correctional facility operated by or under contract to the department;

(c) release from confinement to parole status, termination or expiration of sentence, or escape;

(d) entrance to and release from any community-based residential program operated by or under contract to the department; or

(e) termination of probation or parole.

(6) A sex offender not in the custody of the department and who is confined in a correctional facility not operated by or under contract to the department shall be registered with the department by the sheriff of the county in which the offender is confined upon:

(a) commitment to the correctional facility; and

(b) release from confinement.

(7) A sex offender committed to a state mental hospital shall be registered with the department by the hospital upon admission and upon discharge.

(8) A sex offender convicted by any other state or by the United States government is required to register under Subsection (1)(d)(ii) and shall register with the department within ten days after entering the state.

(9)(a) Except as provided in Subsections (9)(b) and (c), a sex offender shall, for the duration of the sentence and for ten years after termination of sentence, register annually and again within ten days of every change of his place of habitation.

(b)(i) A sex offender convicted of any of the offenses listed in Subsection (9)(b)(ii) shall, for the offender's lifetime, register annually and again within ten days of every change of the offender's place of habitation. This registration

requirement is not subject to exemptions and may not be terminated or altered during the offender's lifetime.

(ii) Offenses referred to in Subsection (9)(b)(i) are:

(A) any offense listed in Subsection (1)(d) if the offender has previously been convicted of an offense listed in Subsection (1)(d);

(B) Section 76-5-402.1, rape of a child;

(C) Section 76-5-402.3, object rape of a child;

(D) Section 76-5-403, forcible sodomy;

(E) Section 76-5-403.1, sodomy on a child; and

(F) Section 76-5-405, aggravated sexual assault.

(c) Notwithstanding Subsections (9)(a) and (b), a sex offender who is confined in a secure facility or in a state mental hospital is not required to register annually.

(10) An agency in the state that registers a sex offender on probation, a sex offender who has been released from confinement to parole status or termination, or a sex offender whose sentence has expired shall inform the offender of the duty to comply with the continuing registration requirements of this section during the period of registration required in Subsection (9), including:

(a) notification to the state agencies in the states where the registrant presently resides and plans to reside when moving across state lines;

(b) verification of address at least every 60 days pursuant to a parole agreement for lifetime parolees; and

(c) notification to the out-of-state agency where the offender is living, whether or not the offender is a resident of that state.

(11) A sex offender shall provide the department with the following information:

(a) all names or aliases the sex offender is or has been known by;

(b) the sex offender's name and residential address;

(c) a physical description, including the sex offender's age, height, weight, eye and hair color;

(d) the type of vehicle or vehicles the sex offender drives; and

(e) a current photograph of the sex offender.

(12) The department shall provide the following additional information when available:

(a) the crimes the sex offender was convicted of; and

(b) a description of the sex offender's primary and secondary targets.

(13)(a) A sex offender who knowingly fails to register under this section is guilty of a class A misdemeanor and shall be sentenced to serve a term of incarceration for not fewer than 90 days and also at least one year of probation.

(b) Neither the court nor the Board of Pardons and Parole may release a person who violates this section from serving a term of at least 90 days and of completing probation of at least one year. This Subsection (13)(b) supersedes any other provision of the law contrary to this section.

(14) Notwithstanding Title 63, Chapter 2, Government Records Access and Management Act, information in Subsections (11) and (12) collected and released under this section is public information.

(15)(a) If a sex offender is to be temporarily sent outside a secure facility in which he is confined on any assignment, including, without limitation, firefighting or disaster control, the official who has custody of the offender shall, within a reasonable time prior to removal from the secure facility, notify the local law enforcement agencies where the assignment is to be filled.

(b) This Subsection (15) does not apply to any person temporarily released under guard from the institution in which he is confined.

(16) Notwithstanding Sections 77-18-9 through 77-18-14 regarding expungement, a person convicted of any offense listed in Subsection (1)(d) is not relieved from the responsibility to register as required under this section.

(17) Notwithstanding Section 42-1-1, a sex offender:

(a) may not change his name:

(i) while under the jurisdiction of the department; and

(ii) until the registration requirements of this statute have expired; or

(b) may not change his name at any time, if registration is under Subsection (9)(b).

(18) The department may make rules necessary to implement this section, including:

(a) the method for dissemination of the information; and

(b) instructions to the public regarding the use of the information.

(19) Any information regarding the identity or location of a victim shall be redacted by the department from information provided under Subsections (11) and (12).

(20) Nothing in this section shall be construed to create or impose any duty on any person to request or obtain information regarding any sex offender from the department.

(21) If the department chooses to post registry information on the Internet, the website shall contain a disclaimer informing the public of the following:

(a) the information contained on the site is obtained from sex offenders and the department does not guarantee its accuracy;

(b) members of the public are not allowed to publicize the information or use it to harass or threaten sex offenders or members of their families; and

(c) harassment, stalking, or threats against sex offenders or their families are prohibited and doing so may violate Utah criminal laws.

(22) The department shall construct the website so that users, before accessing registry information, must indicate that they have read the disclaimer, understand it, and agree to comply with its terms.

(23) The department, its personnel, and any individual or entity acting at the request or upon the direction of the department are immune from civil liability for damages for good faith compliance with this section and will be presumed to have acted in good faith by reporting information.

(24) The department shall redact information that, if disclosed, could reasonably identify a victim.